No. 88-1426

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

HAROLD JACKSON AND OTIS PETERSON AND THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Respondents.

* * * *

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, JOHN R. WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON, OTIS PETERSON; DARRELL L. HAROLD, AND LUEA SORENSON, STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER the Court of Appeals committed serious error in denying Petitioner Tribe the right to be heard in the district court respecting Petitioner Omaha Indian Tribe's charges of forced, fraudulent representation by attorneys in the Department of Justice, who, over the unvarying protests of the Bureau of Indian Affairs and Petitioner Tribe, formulated and filed a constricted complaint, purportedly on behalf of Petitioner Tribe in the case of *United States v. Wilson*: (1) denying, by way of exceptions, Petitioner Tribe's title to the 700 acres of land; (2) abandoning Petitioner Tribe's valid claim to title to 3400 acres of land; and (3) constricted Petitioner Tribe's claim to 1900 acres of land, with full knowledge that Petitioner Tribe, acting by and through an attorney of its own choice, was in the process of preparing Petitioner Tribe's case of *Omaha v. Wilson*, with the objective of quieting Petitioner Tribe's claim to title to 6390 acres comprising the Blackbird Bend Meander Lobe in Monona County, Iowa?

WHETHER the Court of Appeals committed serious error in declaring that Petitioner Tribe's fraud charges were "frivolous and wholly without merit" and that Counsel for Petitioner Tribe filed "a totally frivolous pleading," when both the Court of Appeals and the district court had denied Petitioner Tribe's right to be heard respecting its fraud charges and arrived at its conclusion that Petitioner Tribe's fraud charges were "frivolous and wholly without merit" without a scintilla of evidence to support those conclusions, which are contrary to uncontroverted sworn statements and official documents establishing the fraud?

WHETHER the Court of Appeals committed serious error in upholding the district court's declaration that Petitioner Tribe's charges of fraud were "untimely" and "merit no attention or consideration" when both the Court of Appeals and the Supreme Court have held that timelinesss is not a factor where fraud is involved, declaring, moreover, that the courts themselves have a duty to purge the record of fraud?

WHETHER the Court of Appeals committed serious error

in forcing Petitioner Tribe to retry issues that were fully tried in the trial on the merits in which Petitioner and Respondents offered their oral, documentary, and demonstrative evidence without objection in regard to their respective claims to title to the full 6390 acres of which the Blackbird Bend Meander Lobe is comprised and neither Petitioner Tribe nor Respondents offered evidence respecting the constricted land *within* the Barrett Meander Line, title to which could only be proved by an adjudication of title *outside* of the Barrett Meander Line?

WHETHER the Court of Appeals committed serious error in rejecting Petitioner Tribe's assertions that the principles of *res judicata* precluded a retrial of the issues respecting title to lands *outside* the Barrett Survey Line, those issues having necessarily been tried in determining, adjudging, and decreeing title to lands *within* the Barrett Meander Line?

WHETHER the Court of Appeals committed serious error in accepting the district court's declaration that: "Nothing is gained by recataloguing the evidence here" as a substitute for compliance with Rule 52(a) which mandates the district court to " . . . find the facts specially and state separately its conclusions of law thereon"?

WHETHER the Court of Appeals committed serious error in denying Petitioner Tribe's title to "undisputed" accrestions to Petitioner Tribe's trust lands—proved without the aid of 25 U.S.C. 194—on the grounds that Petitioner Tribe was attempting to "bootstrap" 25 U.S.C. 194 respecting the claims of Respondent Iowa and upheld the claims of private Respondents contrary to proven facts?

WHETHER the Court of Appeals committed serious error in disregard of the provisions of 25 U.S.C. 194 and the Supreme Court decision of *Wilson v. Omaha*, in declaring that the only method pursuant to which Petitioner Tribe could be decreed title to lands within the Barret Meander Line would be to prove that the critical westward river movements were avulsive and effectively denied Petitioner Tribe's right to accretions to Petitioner Tribe's trust lands?

WHETHER the Court of Appeals committed serious error

when it reversed the district court, which had denied the attorneys in the Department of Justice the right to seize and take Petitioner Tribe's "profits" from its farming operations to pay for the alleged improvements on the lands decreed to Petitioner Tribe, those funds being held by the district court in an escrow account for the purpose of apportionment among the parties at the conclusion of the litigation?

* * * * * *

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed:

John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Article VI.

> This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment [V.], Rights of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

25 U.S.C. Sec. 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the

submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

28 U.S.C. 1362. Indian Tribes.

The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

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OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

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AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, AND LUEA SORENSON; STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Omaha Indian Tribe of Nebraska respectfully prays the Court that a writ of certiorari issue to review the opinion of the Court of Appeals for the Eighth Circuit which was rendered on August 12, 1988, and a timely petition for rehearing *en banc* having been denied by the Court of Appeals

on November 10, 1988, the Court, by its Order of January 18, 1989, having extended the period for filing this Petition to and including February 28, 1989.

OPINIONS BELOW

The United States District Court for the Northern District of Iowa entered its Memorandum Opinion on January 13, 1984,[1] holding that Petitioner Omaha Indian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals for the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in

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[1] Appendix A, *United States V. Wilson; Omaha v. Jackson, et al.; Omaha v. Agriculture* (hereafter referred to as *Omaha v. Wilson*) 578 F. Supp. 1191 (U.S.D.C.N.D.Iowa W.D. 1984), p. 5a.

[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural...Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. ...Wilson,* 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

determining the grounds of the Final Judgment and the Opinions of the courts below:[6]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989.[7] The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner Omaha Indian Tribe, Omaha Indian Reservation, Macy, Nebraska, is a duly organized Indian Tribe, recognized by the Secretary of the Interior in accor-

[6] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural*...Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). on June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D.Iowa W.D. 1977).

[7] *See*, Appendices D and E.

dance with 25 U.S.C. Sec. 476.[8] Petitioner Tribe, on October 6, 1975, filed its Compliant in *Omaha v. Wilson* to have quieted its title in and to the Blackbird Bend Meander Lobe, a single, unitary tract of land comprising 6390 acres in Monona County, Iowa, against John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources, in the United States District Court for the Northern District of Iowa, Western Division.

Jurisdiction of District Court: Pursuant to 28 U.S.C. 1362, which provides that an Indian Tribe in the status of Petitioner, may initiate civil actions of the nature here involved arising " . . . under the Constitution, laws, or treaties of the United States." Both of Tribe's actions—*Omaha v. Jackson*, for injunction against Respondents Jackson, Peterson and Mona County; and *Omaha v. Wilson* seeking to quiet title to 6390 acres in the Blackbird Bend Meander Lobe—were initiated pursuant to 28 U.S.C. 1362.

PETITIONER TRIBE SEEKS REVIEW OF FORCED FRAUDULENT REPRESENTATION IN *UNITED STATES V. WILSON*

Petitioner Omaha Indian Tribe seeks review of the August 12, 1988 opinion of the Court of Appeals for the Eighth Circuit[9] in which that court denied Petitioner Tribe the right to be heard respecting its charges of forced, fraudulent

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[8] *See*, Appendix O, p. 269a, 272a. Complaint *Omaha v. Wilson*, C 75-4067 in United States District Court for Northern District of Iowa, Western Division.

[9] Appendix C, p. 37a, Omaha v. Jackson . . . ; Omaha v. . . . Wilson, 854 F.2d 1098 (CA 8, 1988).

Note: The complaint in United States v. Wilson was filed May 19, 1975; immediately upon being informed of that filing within 24 hours, Petitioner Tribe filed on May 20, 1975, its injunction suit, *Omaha v. Respondent Jackson, Respondent Peterson, District Court of Monona County, Iowa*, C 75-4026, Appendix L to enjoin Respondents Jackson and Peterson from interfering with Petitioner Tribe's possession of the lands within the Barrett Meander Line, stressing that United States v. Wilson was highly objectionable and filed over Tribe's protests (p. 253a para. 7). The District Court on June 5, 1975, noting the tensions between Petitioner Tribe and the attorneys in the Department of Justice, granted Petitioner Tribe's motion for an injunction: (1) maintaining Petitioner Tribe in possession of Barrett Meander line lands as *status quo*; (2) Petitioner Tribe never acquiesced in Respondent's possession (p. 260a) and (3) established escrow account p. 262a. (Infra., p. 27), Appendix M.

representation of Petitioner Tribe by attorneys in the Department of Justice in the case of *United States v. Wilson.*[10] That forced, fraudulent representation, among other things, deprived Petitioner Tribe of its title to the 700 acres of land to which the Court of Appeals refers.[11] Moreover:

> [1] The Court of Appeals, in grave error, declared that Petitioner Tribe is bound by the forced, fraudulent representation by attorneys in the Department of Justice, irrespective of the fact that Respondent Tribe represented by counsel of its own choosing, in *Omaha v. Wilson,*[12] had proved its title to the entire 6390 acres in the Blackbird Bend Meander Lobe, which included its title to the 700 acres to which the Court of Appeals refers;[13]
>
> [2] the Court of Appeals, in grave error, by its opinion has sanctioned and approved the repeated denials by the district court of Petitioner Tribe's efforts to be heard respecting Petitioner Tribe's charges of fraud;[14]
>
> [3] The Court of Appeals has further mandated that Petitioner retry issues fully heard and determined at the trial on the merits in the case of *Omaha v. Wilson* with which *United States v. Wilson* had been consolidated;[15]
>
> [4] The Court of Appeals violates the basic principles of *res judicata* in requiring the retrial of issues fully and necessarily adjudicated in the trial on the merits of *Omaha v. Wilson* and *United States v. Wilson;*[16]

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[10] Appendix N, Complaint *United States v. Wilson,* C 75-4024, p. 263a.

[11] *Infra,* p. 7.

[12] Appendix O, Complaint *Omaha v. Agricultural . . . Wilson, et al.,* (referred to in this Petition as *Omaha v. Wilson)* C 75-4067, p. 269a.

[13] *Infra.,* p. 9, Petitioner Tribe's Quiet Title Suit.

[14] Petitioner Tribes' Motion for Interlocutory Appeal, September 7, 1984, denied by Court of Appeals, October 1, 1984; Motion for Summary Judgment against Evan L. Hultman, *et al.,* March 13, 1985, denied April 23, 1985; Motion to Disqualify for Lack of Impartiality Judge McManus, March 17, 1986, denied April 11, 1986; Petition for Writ of Mandamus filed June 12, 1986, denied July 18, 1986 by the Court of Appeals.

[15] *Infra,* p. 23.

[16] *Infra,* p. 23, 24.

[5] The Court of Appeals, contrary to the express language of Rule 52(a) of the Federal Rules of Civil Procedure, affirmed the district court's refusal to enter findings; failed properly to apply the Court's opinion in *Wilson v. Omaha*; and misinterpreted 25 U.S.C. 194;[17]

[6] The Court of Appeals, in error, declared that Respondents were entitled to payment for "improvements" allegedly made, and further declared, wholly without authority and entirely without precedent, authorized the seizure by the Department of Justice of Petitioner Tribe's "profits" from its farming operations, held in escrow by the district court.[18]

FRAUD IN *UNITED STATES V. WILSON*: PETITIONER TRIBE DENIED TITLE TO 700 ACRES AND TRIBE'S TITLE TO 3400 ACRES ABANDONED

Petitioner Tribe and the Bureau of Indian Affairs, prior to, after, and at all times to date, protested the initiation and trial of the case of *United States v. Wilson* as grossly improper. Those protests were made to Myles E. Flint, Attorney, Department of Justice who formulated the complaint in *United States v. Wilson*, denying the Tribe's title to 700 acres of land and abandoning Tribe's valid claim to title to 3400 acres in the Blackbird Bend Meander Lobe. Mr. Flint and his superior were fully informed that the Tribe was preparing *Omaha v. Wilson*, being assisted and funded by the Bureau of Indian Affairs.[19] Mr. Flint and his superiors informed Petitioner Tribe and the Bureau of Indian Affairs that they were communicating with and exchanging information with attorneys for Respondents and that the Department of Justice, over Petitioner Tribe's protests and that of the Bureau of Indian Affairs, intended immediately and without preparation to

[17] Appendix C, p. 39a, 42a, 44a.
[18] Infra., p. 26.
[19] Appendix P, Petitioner Tribe's Motion for Summary Judgment, p. 276a; Affidavit p. 294a.

initiate the case of *United States v. Wilson* as demanded by attorneys for Respondents.[20]

THE INCEPTIVE FRAUD PRACTICED UPON PETITIONER TRIBE

In disregard of Petitioner Tribe's protests and those of the Bureau of Indian Affairs and without advising the Bureau of Indian Affairs or Petitioner Tribe of his intentions, Mr. Flint submitted the case of *United States v. Wilson* to Evan L. Hultman, United States Attorney, Cedar Rapids, Iowa, for filing in the United States District Court for the Northern District of Iowa, Western Division.

Evan L. Hultman, United States Attorney, Fraudulently Violated Petitioner Tribe's Valid Claims to Title and Violated Code of Professional Responsibilities

On May 19, 1975, Evan L. Hultman, United States Attorney, filed in the District Court the complaint in *United States v. Wilson.*

Prior to forcing his representation upon Petitioner Tribe in *United States v. Wilson,* Evan L. Hultman had represented Respondent Iowa as Attorney General in the cases of *Lakin v. State of Iowa* and *Peterson v. State of Iowa.*[21] Respondents Lakin and R.G.P., Inc. (Peterson) and the State of Iowa settled the issues among themselves in disregard of Petitioner Tribe's claim to the Blackbird Bend Meander Lobe.[22] Evan L. Hultman, having obtained title for Respondent Iowa to the approximately 700 acres denied Petition Tribe's title to that 700 acres of land in the complaint filed by Mr. Hultman in *United States v. Wilson.* Plate I graphically displays the apportionment of the Blackbird Bend Meander Lobe among Respondent Iowa and Respondents Lakin and R.G.P. Inc., (Peterson).

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[20] Appendix W, Reply to Opposition p. 337a; attached Memorandum, p. 351a.

[21] Appendix P, Motion for Summary Judgment, p. 276a; Affidavit p. 291a; Appendix Q, p. 299a; *Lakin v. Iowa*; Appendix R p. 304a, 306a; Answer and Desclaimer Evan L. Hultman, State of Iowa; Appendix S, p. 307a; *Peterson v. State of Iowa*; Appendix T, p. 318a; 319a; Answer Evan L. Hultman, State of Iowa.

[22] *Ibid.*

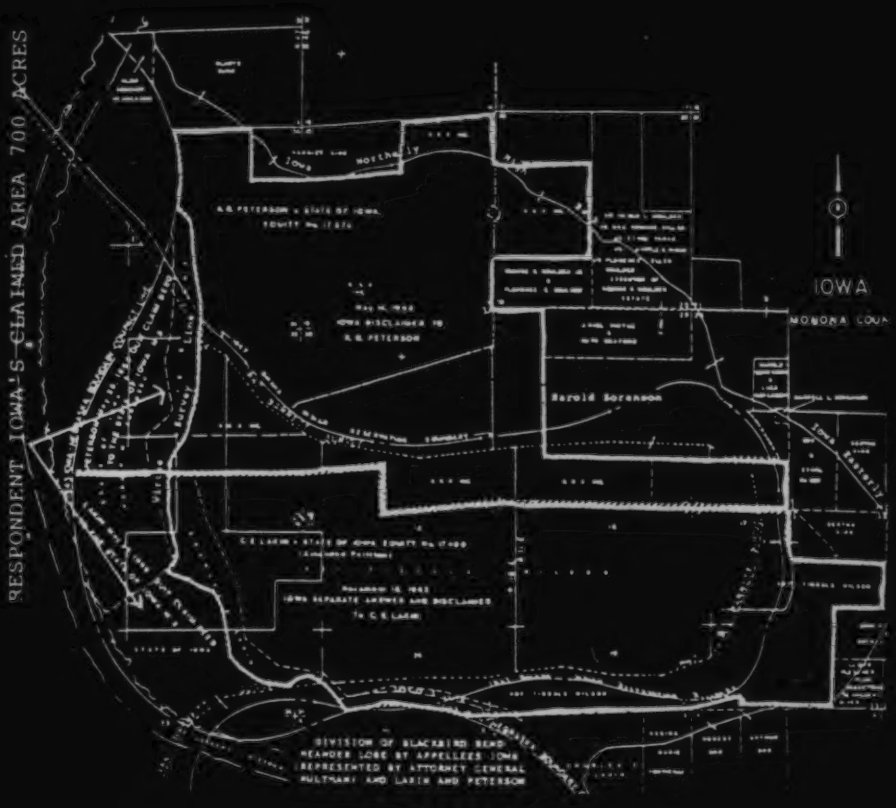

PLATE I
APPORTIONMENT AMONG RESPONDENTS OF
BLACKBIRD BEND MEANDER LOBE
WITH RESPONDENT IOWA REPRESENTED BY EVAN L. HULTMA

Hultman's Forced, Fraudulent Representation

Petitioner Tribe, as reviewed above, within 24 hours of being informed that *United States v. Wilson* had been filed, protested that filing in Petitioner Tribe's injunction suit, *Omaha v. Jackson*,[23] and on June 3, 1975, filed its "Application To Dismiss or Hold in Abeyance" the case of *United States v. Wilson*.[24] Mr. Hultman's response, as United States Attorney, was filed June 16, 1975, declaring that he could force his representation upon Petitioner Tribe and that he could proceed without consent or acquiescence of Petitioner Tribe.[25] On July 1, 1975, the district court sustained Evan L. Hultman's contention, denying Tribe's Motion To Dismiss or Hold in Abeyance.[26]

Petitioner Tribe's Quiet Title Action, Omaha v. Wilson[27]

Petitioner Tribe completed its investigations in support of its claim and on October 6, 1975, filed its quiet title action, *Omaha v. Wilson*, claiming title to the 6390 acres in the Blackbird Bend Meander Lobe, invoking the jurisdiction of the district court pursuant to 28 U.S.C. 1362 and was represented in that proceeding by counsel of its choice, pursuant to 25 U.S.C. 476.[28]

Respondents, unable to deraign their titles to patents from the United States, asserted affirmatively in their answers by way of counterclaims[29] that (1) the Blackbird Bend Meander Lobe was totally obliterated and washed away by Missouri River action thereby extinguishing Petitioner Tribe's title; and (2) the Blackbird Bend Meander Lobe was replaced in its

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[23] Appendix L, p. 253a, *Supra., p. 4, ftn. 9.*

[24] Appendix Y, Petitioner Tribe's "Application to Dismiss or Hold in Abeyance" the case of *United States v. Wilson*, p. 367a.

[25] Appendix Z, Response of Evan L. Hultman to Application, p. 369a.

[26] Appendix AA, Order of July 1, 1975, p. 369a, 371a.

[27] A few landowners occupying small tracts of land within the Blackbird Bend Meander Lobe were joined as party defendants in *Omaha v. Wilson*, C 75-4067, who did not participate in the trial on the merits. It is reasonably expected that those adverse claims can be satisfactorily resolved by the process of settlement.

[28] Appendix O, Complaint *Omaha v. Wilson* C 75-4067, p. 269a.

[29] Appendices BB, and CC, p. 279a, para. 8; DD, p. 384a, para. 42, p. 387a, para. 37, 386a; Appendix EE, Sorenson does not deraign title, p. 390a.

entirety by accretions to the Iowa riparian bank. Respondents claim their titles are derived from owners of the riparian land to which the alleged accretions attached.[30]

To counteract and to overcome the fraud practiced upon Petitioner Tribe by Messrs. Flint and Hultman, the Tribe moved the district court for an order consolidating the case of *United States v. Wilson*, C 75-4024 with Tribe's case of *Omaha v. Wilson*, C 75-4067, which case totally encompasses the constricted and limited area to which *United States v. Wilson* pertains. On January 26, 1976, the district court granted Petitioner Tribe's motion for consolidation.[31] Plate II set forth below graphically displays the constriction by the Department of Justice of Tribe's claim in *United States v. Wilson*, as contrasted to Petitioner Tribe's claim of 6390 acres in *Omaha v. Wilson*.

PLATE II

Plate II evidences the gross error committed by the district court in attempting to bifurcate the claims of Petitioner Tribe, as pleaded by Messrs. Flint and Hultman in

[30] *United States v. Wilson*, 433 F. Supp. 67, 88 para. V (U.S.D.C.W.D.Iowa, W.D.1977). See, Appendix K, p. 205a, p. 245a, V.

[31] Appendix FF, Order of January 26, 1976, p. 395a.

the case of United States v. Wilson. Plate II is Plate III of the opinion of the Court of Appeals reversing the original adjudication by the district court which declared in error, as contended by Respondents that the entire Blackbird Bend Meander Lobe was comprised of accretions to the Iowa riparian bank. As can be seen from Appendix I, page 144a, the Missouri River had—by the process of erosion of the "Northerly Iowa High Bank" and accretions to the Omaha Indian Reservation—progressed far the north and away from the 1967 Barrett Meander Line. Plate II locates the Missouri River at the toe of the Northerly Iowa High Bank. The "centre" of that River was the boundary of the Omaha Reservation, pursuant to Tribe's Treaty of 1854.

As emphasized by sworn statements, Appendix P, page 294a, para. 25, Mr. Flint, who prepared the complaint in United States v. Wilson, was fully informed that it was wholly improper to attempt to limit Petitioner Tribe's claim to title to the Barrett Meander Line as was further informed that ". . . the 1867 Barrett Meander Line was not and could not be considered a boundary line . . . ."

It is inexplicable why the district court attempted to restrict both Petitioner Tribe and Respondents to the wholly illusory Barrett Meander Line when their claims necessarily pertain to the entire Blackbird Bend Meander Lobe, as displayed by Plate II.

On April 5, 1976, the district court *sua sponte*, entered an order amending its January 26, 1976 Order of Consolidation and limited the trial to the case within the Barrett Meander Line, to which the case of *United States v. Wilson* pertains.[32]

Having completed comprehensive discovery among all parties respecting the full 6390 acres within the Blackbird Bend Meander Lobe, Petitioner Tribe sought further to insulate its case of *Omaha v. Wilson* from the fraudulent case of *United States v. Wilson* and on September 3, 1976, filed its "Motion for a Protective Order Against the Department of Justice,"[33] praying the district court (1) totally to separate the case of *Omaha v. Wilson* from *United States v. Wilson*; (2) to declare Petitioner tribe would not be bound by the forced representation of the Department of Justice; and (3) stressing in Tribe's Resolution in support of that motion that Evan L. Hultman was immersed in a conflict of interest having previously represented Respondent Iowa in the case of *Lakin v. Iowa*.[34]

The district court granted Petitioner Tribe's Motion for Protective Order, allowing Petitioner Tribe the right to offer its case in chief ahead of the Department of Justice but denying the Tribe the right to cross-examine the Department of Justice witnesses and to rebut the Department of Justice case.[35] Subsequently, the district court reversed itself, allowing Tribe to cross-examine Department of Justice witnesses and to rebut.[36]

Irrespective of the district court's *sua sponte* order of April 5, 1976 purporting to limit the trial to the constricted complaint in *United States v. Wilson*, filed by the Department

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[32] Appendix GG, *Sua Sponte* Order of April 5, 1976, p. 403a, 405a. *See, Infra*, p. 24.

[33] Appendix HH, "Motion for a Protective Order," p. 407a, and supporting Resolution, p. 411a.

[34] Appendix P, p. 276a; Affidavit, p. 291a, para. 18, *et seq.*.

[35] Appendix II, Order dated October 29, 1976, p. 416a.

[36] Appendix JJ, T.R., November 15, 1976, p. 416a, 417a.

of Justice, Petitioner Tribe[37] and all parties, including the Department of Justice perforce tried the title to the 6390 acres comprising the full Blackbird Bend Meander Lobe. The proof in that trial on the merits establishes the fact that the Blackbird Bend Meander Lobe was a single unitary tract and that the Barrett Survey was a transitory line established during a period of high water and did not constitute nor was it intended to constitute a boundary line. Rather, the Treaty of 1854 provided that the boundary of the Omaha Indian Reservation was the "centre" of the 1867 Missouri River when Barrett meandered that stream.

At the conclusion of the full trial on the merits respecting the 6390 acres of land in the Blackbird Bend Meander Lobe. Respondents filed with the district court their proposed findings of fact, conclusions of law and judgment. In those findings and conclusions, Respondents denied the applicability of 25 U.S.C. 194 which placed upon Respondents the burden of proof. The district court adopted Respondents' findings verbatim, including Respondents' interpretation of 25 U.S.C. 194, and entered judgment for Respondents, declaring that: (a) the Blackbird Bend Meander Lobe had been totally washed away and (b) that the Blackbird Bend Meander Lobe was replaced in its entirety by accretions to the Iowa riparian lands and that the Respondents derived their titles from the owners of those riparian land, all as contended by Respondents. The district court dismissed the cases of both Petitioner Tribe and the United States in its final judgment.[38]

From that judgment for Respondents, Petitioner Tribe appealed. In reversing the district Court's judgment, based upon the verbatim adoption of Respondents' findings of fact and Conclusions of law, the Court of Appeals declared that:

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[37] Note: When Petitioner Tribe rested its case in chief, it renewed its protests to the participation of the Department of Justice in the proceedings in its Motion and Objection to the Introduction of Evidence by the Department of Justice. It is stressed that, by that forced representation, there had been a "Denial by the Justice Department of the Omaha Indian Tribe's Constitutional and Civil rights to be Represented in Litigation by Counsel of Its Own Choosing," Appendix KK, p. 419a, 421a T.R. November 15, 1976.

[38] Appendix K, *United States v. Wilson*, 433 F. Supp. 67 (U.S.D.C.N.D. Iowa,W.D. 1977), p. 245a, Conclusion of Law v. Decree, p. 252a, para 7.

". . . . the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum of law written by the defendants." [Respondents here][39]

The Court of Appeals declared that the district court erred in refusing to apply 25 U.S.C. 194, which places upon the Respondents the burden of proof. The Court of Appeals moreover declared that the "basic finding essential to the defendants' case" that the Blackbird Bend area was totally washed away and totally replaced by " . . . new land . . . added to the Iowa riparian land from the owners of which defendants derived their title" was " . . . clearly erroneous and not supported by substantial evidence." The Court of Appeals—though rendering its opinion predicated upon the evidence at the trial on the merits involving the entire 6390 acres in the Blackbird Bend Meander Lobe—declared that the dispute centers on the ownership of an area known as Blackbird Bend surveyed in 1867 by Barrett.[40]

The Court in *Wilson v. Omaha* affirmed and remanded.[41] The Court of Appeals determined the applicable state law,[42] as mandated by the Court, and the cases were once again before the district court with reference to title to only the 700 acres which were obtained by Evan L. Hultman for Respondent Iowa,[43] in settlement of the Lakin-Peterson cases.

On Remand, the District Court Decreed Title to 700 Acres to Petitioner Tribe

On remand from the Court and the Court of Appeals, the district court, predicated upon proof offered by Petitioner Tribe in the trial on the merits, declared, adjudged, and determined, respecting title to the 700 acres, that Petitioner

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[39] Appendix I, p. 135a, 154a, ftn. 21, *Omaha v. Wilson*, 575 F.2d 620, (CA 8, 1978).

[40] *Ibid.*, p. 154a, 155a, 167a.

[41] Appendix H, p. 107a, 131a, 132a, iv, *Wilson v. Omaha*, 422 U.S. 653 (1979).

[42] Appendix I, p. 135a, 154a, 186a, *et seq.*, *Omaha v. Wilson*, 575 F.2d 620, (CA 8, 1979); *See*, also *Omaha v. Wilson*, 614 F.2d 1153 (CA 8, 1980); *cert.den.* 449 U.S. 825 (1980).

[43] *Supra.*, *p. 7, et seq.*

proved—as against Respondent State of Iowa and Respondents R.G.P., Inc., Wilson, and Lakin—that those lands were accretions to Petitioner Tribe's trust land, title to which was quieted in Petitioner Tribe. Predicated upon that determination, the district court quieted title in the Tribe to those 700 acres.[44] From that judgment for Petitioner Tribe, Respondents State of Iowa, Wilson, Lakin, and R.G.P., Inc. appealed.

District Court Reversed by Court of Appeals

The Court of Appeals reversed the district court's judgment for Petitioner Tribe. Having acknowledged: (a) the "undisputed" fact that the 700 acres of land had been washed away and replaced by accretions to Petitioner Tribe's trust lands and (b) that the destruction and replacement of the 700 acres of land had occurred prior to the entry of Respondents upon those lands, the Court of appeals cryptically declared, nevertheless, that:

> "We deem this fact not significant. It is the *area* of land now occupied by the landowners that is important. *See, Wilson v. Omaha Indian Tribe*, 422 U.S. at 668." [45]

Disregarded likewise by the Court of Appeals was the express finding by the district court that Petitioner Tribe proved its title to the 700 acres of land without the aid of 25 U.S.C. 194, " . . . by a clear preponderance of evidence . . . " [46] Irrespective of that finding, the Court of Appeals, in serious error, rejected the district court's "reasoning" because it allows the Tribe to bootstrap section 194 in asserting its claim against the State.[47] The Court of Appeals, having denied Tribe's valid claims to title as declared by the district court, then imposed upon the Tribe the obligation of proving

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[44] Appendix F, Re: *United States v. Wilson; Omaha v. Jackson; Omaha v. Agricultural . . . Wilson, et al*, 523 F.Supp. 874, title to State land in Tribe p.78a, title to fee-patented lands in Tribe against Respondents R.G.P. and Wilson, p.80a; Petitioner Tribe's Title vested without aid of 25 U.S.C. 194, p.80a, ftn.19, (U.S.D.C.N.D. Iowa W.D. 1981).

[45] Appendix G, p. 92a, 101a *United States v. Wilson*, 707 F.2d 304, (CA 8, 1982)(Court's emphasis).

[46] Appendix F, p.52a, 80a, ftn.19

[47] Appendix G, p. 0a, ftn.19 92a, 99a.

" . . . that the critical westward movements from 1879 to 1923 were avulsive . . . " adding moreover that Petitioner Tribe " . . . must prove that the river moved westward over the eastern Barrett survey land between 1867 and 1923 by avulsion . . . " [48] That ruling by the Court of Appeals is challenged by Petitioner Tribe .[49]

The Court of Appeals, in error, as a condition to entering a judgment for Petitioner Tribe to the 1900 acres, to which the attorneys in the Department of Justice constricted Tribe's claims, declared that the value of the improvements made by Respondents upon the Tribe's Blackbird Bend lands must be paid.[50]

The Court of Appeals again remanded the matter to the district court, which entered its final judgment, from which Petitioner Tribe appealed.

District Court's Memorandum Opinion, and Final Judgment and Decree Consummate the Inceptive Fraud Constricting and Denying Tribe's Title

Confronted with the mandate from the Court of Appeals that reversed the district court's judgment in favor of the Tribe and confronted with the cryptic language of the Court of Appeals, which is impossible to reconcile with the evidence, the district court on January 13, 1984 entered its Memorandum Opinion.[51] In that Memorandum Opinion, the district court expressed its reason for refusal to enter findings, declaring that: "Nothing is gained by recataloguing the evidence here," observing that the Court of Appeals had foreclosed the district court's views on the evidence as being a foundation for a decision. The district court concluded " . . . no party can meet its burden of proving accretion or avulsion."[52]

Continuing, in total error, the district court declared that, ". . . by chipping away at the issues," the case was

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[48] *Ibid.*, p. 101a, 102a.

[49] Infra., p. 25-26.

[50] Appendix G, p. 104a; *see*, also Appendix C, p. 44a *et seq.*

[51] Appendix A, p. 5a, 7a. *United States v. Wilson*, 578 F. Supp 1191 (U.S.D.C.N.D. Iowa W.D. 1984).

[52] *Ibid.*, p. 8a.

confined to 2900 acres with "... only ... approximately 700 acres ... still in dispute." That erroneous statement is made irrespective of the fact that the district court had tried the issues on the merits, as asserted by Petitioner Tribe and the Respondents, and had entered findings of fact and the original judgment,[53] which, *of necessity*, involved the entire Blackbird Bend Meander Lobe. In reversing that judgment, the Court of Appeals in its decision, *of necessity*, involved the entire Blackbird Bend Meander Lobe, not the 2900 acres within the Barrett Meander Line.[54]

Confronted with the district court's adamant insistence that Petitioner Tribe's claim was confined to 2900 acres, Petitioner Tribe was forced—reluctantly—to expose the forced, fraudulent representation of the Department of Justice attorneys, Messrs. Flint and Hultman, who, at the behest of the Respondents, had attempted to reduce Petitioner Tribe's claim to title from 6390 acres to 1900 acres.

The district court, having emphasized that it (1) had not heard and (2) would not hear Petitioner Tribe's charge of forced fraudulent representation, entered its May 29, 1987 final judgment and decree, amended by the Order of June 30, 1987. The district court further declared that the Department of Justice attorneys could not use Petitioner Tribe's escrow funds toward payment to Respondents for alleged improvements on Petitioner Tribe's lands.[55]

From that final judgment and decree of the district court, Petitioner Tribe sought review from the Court of Appeals.

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[53] *Ibid.*, p. 6a. *Note*: The district court seriously erred in declaring that the Tribe was claiming "11,000 acres of land ... known as Blackbird Bend." The district court knew full well, or most assuredly should have known, based upon the protracted trial on the merits, that the Blackbird Bend Meander Lobe was comprised of 6390 acres and additional lands are claimed by the Tribe in Monona and Mission Bend areas, which areas have not been tried and were not before the district court in these proceedings.

[54] *Supra*., p. 4.

[55] Appendix B, p. 16a. *United States v. Wilson* Final Judgment and Decree, dated May 29, 1987, as amended by the Order of June 30, 1987.

resulting in the August 12, 1988 Decision[56] to which this Petition pertains.

ARGUMENT

FORCED FRAUDULENT REPRESENTATION IS FRAUD AGAINST PETITIONER TRIBE AND AGAINST THE COURTS

The Court of Appeals for the Eighth Circuit, in its hallmark decision, *Fiske v. Buder*, declares that when:

> . . . [a clients's] attorney fraudulently connives at his defeat or sells out his client's interests . . .

it is fraud of a character that will justify a court setting aside a judgment irrespective of the lapse of time.[57] Mr. Flint's "sellout" of Petitioner Tribe has been fully reviewed.[58]

Evan L. Hultman United States Attorney, joined Mr. Flint in "selling out" Petitioner Tribe's interests by filing the intentionally constricted complaint in *United States v. Wilson* and personally forced his rejected representation upon Petitioner Tribe in that litigation.[59] Mr. Hultman responded, that Petitioner Tribe's charges involved events that took place "10 and 20 years ago."[60] That is not the issue. Mr. Hultman ignores the fact that he acted unethically in denying Petitioner Tribe's title to the same 700 acres of land he had obtained for Respondent Iowa in previous litigation. The Department of Justice, in seeking to defend Mr. Hultman, makes the specious statement that it ". . . is simply irrelevant that Mr. Hultman had previously represented Respondent Iowa."[61] That statement is bizarre. It is most relevant that Mr. Hultman "sold out" Petitioner Tribe in *United States v. Wilson* for the benefit of his former client Respondent Iowa.

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[56] Appendix C, p.37a, *Omaha v. Jackson . . . Omaha v. . . . Wilson*, 894 F. 2d. 1089 (1988).

[57] *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942); *cert.den* 273 U.S. 756 (1942).

[58] Supra., p.7, *et seq.*

[59] Appendix Z, p.369a, 370a.

[60] Appendix V, p.329a, 331a, para. I; 335a, IV.

[61] Appendix PP, Brief of United States, p.457a.

No mention is made whatever by the Department of Justice to the basic charges against Mr. Flint.[62] Counsel for Petitioner Tribe is vituperatively assailed by the Department of Justice's response to Petitioner Tribe's request for a writ of mandamus[63] and by Mr. Hultman in his opposition.[64] If there is merit to the charges of the Department of Justice, which is denied, Counsel should be punished along with Messrs. Hultman and Flint.

The Court of Appeals sustained the district court's denial of Petitioner Tribe's efforts to be heard in regard to the fraud charges.[65]

Petitioner Tribe again raised the issue of fraud at the March 9, 1987 hearing, at which time the district court declared that (1) it had not and (2) will not hear those fraud charges, stressing " . . . the fraud question, I just can't let that rabbit into this arena."[66] By an Order dated April 1, 1987, the district court declared that the Tribe had not been denied its right to be heard respecting Petitioner Tribe's " . . . charges of fraudulent representation by the Department of Justice."[67]

On May 1, 1987, Petitioner Tribe challenged that April 1, 1987 Order, and the district court admitted that the fraud charges were not mentioned by Petitioner Tribe and that fraud could be gleaned only by way of " . . . innuendo, rather than by direct reference."[68]

The Supreme Court has expressly declared that those attorneys in the status of Messrs. Flint and Hultman as agents of the Trustee United States are charged with fulfilling their obligations in conformity with the most "exacting fiduciary standards."[69]

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[62] Appendix U, p.321a, 327a, Appendix X, p.363a, 366a. Appendix P, p.276a, 294a; Appendix W, p.337a, 351a, *et. seq.*

[63] Appendix 00, p.443a; Appendix QQ; p. 461a, denial of pet. for mand.;

[64] Appendix V, p.329a, 331a, para.II.

[65] *Infra.*, p.24., *et seq.*

[66] Appendix LL, T.R. March 9, 1987, p. 427a-429a.

[67] Appendix MM., p. 430a, 431a.

[68] Appendix NN., p.435a, 442a.

[69] *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The Court of Appeals' August 12, 1988 decision departs drastically from its *Arkansas v. Dean* decision in which that court declared that disqualification [of attorney] is an ethical, not a legal matter[70] and is in the public's as well as a client's interest. Continuing, the Court of Appeals states that the public's interest cannot be disregarded by a court's permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility.[71]

In its *Arkansas* decision, there was extensively reviewed Canon 9 of the Code of Professional Responsibility declaring that "[a] lawyer should avoid even the appearance of personal impropriety." A principal aspect of Canon 9 is then quoted:

> EC 9-3 After a lawyer leaves judical office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Repeated decisions have stressed the qualities of *integrity* and *fidelity* so gravely violated by Messrs. Flint and Hultman.[72] In *Fiske v. Buder*,[73] citing *United States v. Throckmorton*, the court declared that where, as here, an attorney connives to sell out his client " . . . the fraud will vitiate any judgment which could be entered."[74] In *United States v. Shotwell Manufacturing Co., et al.*, the Supreme Court reviewed fraudulent acts systematically practiced upon the district Court, the Court of Appeals, and the Supreme Court itself,

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[70] *State of Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 384 (CA 8, 1979).

[71] *Ibid.*, citing *Emle Industries, Inc. v. Patentex Inc.*, 472 F.2d 562, 574 (CA 2, 1973).

[72] *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491 499; 141 A. 866, 868 (1968); *T C. Theater Corp. v. Warren Bros. Pictures*, 113 F.Supp. 265, 268 (U.S.D.C.S.D.N.Y.1953); *Consolidated Theaters, Inc. v. Warren Bros.* 216 F.2d 920, 924 (CA 2, 1954); In the Matter of Cipriano, 68 N.J. 398, 346 A.2d 393 (1975). *See*, Vol. 15, *Federal Practice and Procedure*, Sec. 3911; 1985 Supp., p. 245, *et seq.*

[73] 125 F.2d 841 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1942).

[74] *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1942).

as here. The Court declared that corrective action was required: "The integrity of the judicial process demands no less."[75]

The Court of Appeals erroneously states that Petitioner Tribe had first raised the issue of " . . . fraud in 1976."[76] Predicated upon that misconception, the Court of Appeals declared that the Tribe had been dilatory in not raising the issue again until 1985. While the Court of Appeals does not designate its source for declaring that the Tribe had first raised the fraud issue in 1976, it would appear that the Court of Appeals was relying on the totally erroneous Order of April 1, 1987.[77] That Order attempts to establish—based upon Tribe's early motion for a protective order—that Petitioner Tribe had not been denied its right to be heard respecting its "charges of fraudulent representation by the Department of Justice."[78] An examination of the motion, the Resolution, and the district court's order of October 29, 1976, proves beyond controversy that none of those documents referred to fraud or could be honestly interpreted inferentially to refer to fraud.[79]

Fraud that strikes at the validity of a judgment, as here, can be raised at any time, particularly under the circumstances where the final judgment was entered May 29, 1987, and all of the Respondents are parties to that final judgment and, indeed, are substantial beneficiaries of the fraud challenged here by Petitioner tribe giving rise to that judgment. In the *Emle* decision[80] cited above, the court would not permit the issue of delay to preclude a party from raising issues of misconduct, far less serious than the fully supported

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[75] 355 U.S. 234, 240, 241 (1957).

[76] Appendix C, p. 37a, 40a, ftn. 4.

[77] Appendix MM, p. 430a, 431a.

[78] Appendix HH, Motion for Protective Order, with Resolution attached, p. 407a, 408a-409a; 411a.

[79] Appendix II, p. 416a, 417a, para. 1. Order of October 29, 1976, granting in part and denying in part Tribe's motion for a protective order.

[80] *Emle Industries v. Patentex*, 478 F.2d 562, 574 (CA 2, 1973); *Supra.*, see, p. 16, "District Court's Memorandum Opinion, and Final Judgment and Decree consummate the inceptive Fraud Constricting and Denying Tribe's Title."

charges against Messrs. Flint and Hultman. On the subject it is declared:

> . . . the Court's duty and power to regulate the conduct of attorneys cannot be defeated by the laches of a private party or complainant.[81]

Here, the fraud of Messrs. Flint and Hultman, as attorneys for the Department of Justice, is not only upon Petitioner Tribe but on the courts themselves. As the Supreme Court stated in *Hazel-Atlas*, fraud of that character involves the:

> " . . . tampering with the administration of justice . . . [which] is a wrong against the institutions . . . ."[82]

Adhering to the concepts of *Hazel-Atlas*, the Court of Appeals in *Virgin Island Housing Authority v. David*,[83] declared that:

> Since attorneys are officers of the court, their conduct, if dishonest, would constitute a fraud upon the court.

In *Moore*, there was extensively reviewed the concepts of *Hazel-Atlas*, declaring that, while an attorney should represent his client with singular honesty,

> " . . . his loyalty to the court, as an officer thereof, demands integrity and honest dealings with the court. And when he departs from that standard, in the conduct of a case, he perpetrates a fraud upon the Court."[84]

Predicated upon that abundance of authority and high principle, the Court of Appeals committed plain and serious error in accepting the erroneous declaration by the district court that Tribe's conduct was " . . . clearly untimely and merits no serious attention or consideration." Quite obviously the district court erred in denying Petitioner Tribe's motion to disqualify and for summary judgement.

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[81] *Ibid.*, p. 574.

[82] *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

[83] 823 F.2d 764, 767 (CA 3, 1987).

[84] Vol. 7, *Moore's Federal Practice*, 1987-88, Cumulative Supplement, Sec. 60.33, Fraud upon the Court, p. 60-359.

JUDGEMENT OF MAY 29, 1987 IS *RES JUDICATA* RESPECTING LANDS OUTSIDE BARRETT LINE

The Decision of the Court of Appeals forces Petitioner Tribe to retry issues fully heard and resolved in the original trial on the merits.[85] The Supreme Court recognized that the Blackbird Bend litigation involved the title to the lands *inside* and *outside* the Barrett Line, noting that Respondents " . . . argued that the river . . . eroded the reservation lands . . . ." which lands were replaced by " . . . accretions . . . " that were attached to " . . . the east-bank riparian" lands.[86] Petitioner Tribe urged to the Court of Appeals that it was impossible to determine the title to the lands within the Barrett Meander Line without having first determined that those lands were not accretions to the Iowa riparian bank, which was far removed from the Barrett Meander Line.[87] It is of utmost importance that the Court of Appeals declared that: "The basic finding essential to defendants' case is the trial court's statement . . . ." that the entire Blackbird Bend Meander Lobe had been "washed away" and replaced by " . . . new land . . . added to the Iowa riparian bank . . . "[88] outside the Barrett Meander Line, Plate II above. It was stressed to the Court of Appeals that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.[89]

In *Block v. Commissioner*, the Supreme Court declared the principle that when an issue which is material has been decided by a court ". . . and the judgment could not have

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[85] Appendix C., p. 37a; 43a-44a; ftn. 5.

[86] *Appendix H, 107a; 112a; 115a. Wilson v. Omaha*, 442 U.S. 653, (1979).

[87] *See*, Plate II above, p. 10.

[88] Appendix I, p. 135a, 167a, *Omaha v. Wilson*, 575 F.2d 600, 639 (CA 8, 1978).

[89] Restatement (Second) Judgment, para. 27, p. 250.

been decided without deciding it,"[90] then the principles of *res judicata* are controlling in any other litigation among the parties involving the same subject *res*. It is manifest that the Court of Appeals violates the principles of *res judicata* in forcing Petitioner Tribe to retry the issues respecting title to the Blackbird Bend area *outside* the Barrett Meander Line.

Court of Appeals' Rulings Clearly Erroneous

Additionally Petitioner Tribe urged unsuccessfully to the Court of Appeals that the district Court's *sua sponte* order of consolidation[91] could not change or alter Petitioner Tribe's case of *Omaha v. Wilson* in which Petitioner Tribe sought to have quieted in itself title to the 6390 acres and to limit Tribe's claim to 1900 acres as prayed for in the case of *United States v. Wilson*. As stressed by the Supreme Court in *Johnson v. Manhattan*, an order of consolidation ". . . does not merge the suits . . ." or change the rights of the parties.[92]

Contrary to the record, the Court of Appeals made the *de novo* findings that Petitioner Tribe's charges of forced, fraudulent representation by attorneys in the Department of Justice were "frivolous and without merit." The Court of Appeals harshly imposed sanctions against Counsel for

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[90] 99 U.S. 686, 693 (1878). *See*, also *Partmar Corp. et al., v. Paramount Pictures, et al.*, 347 U.S. 89, 100-103 (1954); *Montana v. United States*, 440 U.S. 147, 153 (1979): "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based upon the same cause of action. Under collateral estopel, *once an issue is actually and necessarily determined* by a court of competent jurisdiction, *that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.*" (Emphasis supplied). Those principles were applied against the Tribe in *Oglala Sioux Tribe v. Homestate Min. Co.*, 722 F.2d 1407, 1413 (CA 8, 1984); Vol. 18, *Federal Practice and Procedure*, Sec. 4421—Necessarily Decided, p. 192, *et seq.*; 1987 Pocket Part, 4421, Issue Preclusion.

[91] Appendix GG, p. 403a, 405a.

[92] 289 U.S. 472, 496-497 (1933); *See* also *Mutual Life Ins. Co., v. Hillmon*, 145 U.S. 285, 293 (1892) reviewing the background and history of the consequences of consolidation both in English practice and here. *See* also, *Degraffenreid v. General Motors*, 558 F.2d 480, 486 (CA 8, 1977). *United States v. Altman*, 750 F.2d 684 (CA 8, 1984). *Garber v. Randell*, 477 F.2d 711, 715 (CA 2, 1973). *See*, Vol. 9, *Federal Practice and Procedure*, Sec. 2382, p. 255, *et seq*; 1987 Pocket Part, p. 68, *et seq*; *See* Plate II p. 10, *Supra*.

Petitioner Tribe for allegedly filing a "totally frivolous pleading."[93] Those declarations, contrary to the record, are unprecedented.

The Supreme Court has repeatedly declared that far less definitive charges "however inartfully pleaded" should not be dismissed, adding, moreover that allegations of that character are generally taken to be true.[94] Applying the criteria applicable to clearly erroneous findings of fact, it is respectfully urged that the Court of Appeals should be reversed respecting its unsupported declarations that Petitioner Tribe's charges are "frivolous and totally without merit."[95]

The Court of Appeals, in denying Petitioner Tribe title to accretions to trust lands, admitted that it is "undisputed" that the 700 acres of land were accretions to Petitioner Tribe's trust lands but, nevertheless, inexplicably declared: "We deem this fact not significant."[96]

Rather, citing the Supreme Court's opinion, in *Wilson v. Omaha,*[97] the Court of Appeals declared "the *area* of land" is controlling. There is no basis or credence to the Court of Appeals' determination that the Court's decision in *Wilson v. Omaha* could be used in denying Tribe's title to the 700 acres.[98]

Harshly imposing upon Petitioner Tribe the constricted complaint in *United States v. Wilson,* the Court of Appeals

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[93] Appendix C, p.37a, 40a. ftn. 4.

[94] *Hughes v. Rowe, et al.*, 449 U.S. 5, 9-10 (1980), citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

[95] Append C., p. 37a, 40a. ftn. 4. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *See*, also *United States v. Bradley-Dodson Co.*, 281 F.2d 675, 680 (1960); *Policy Holder's National Life Ins. Col. v. Harding*, 147 F.2d 852 (CA 8, 1945); *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730 (CA 8, 1965); *cert.den.* 382 U.S. 977 (1965). *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). *See*, 5 *Federal Practice and Procedure*, Wright, Miller and Kane, Sec. 1350. 551-52, cited authorities, and Pocket Part.

[96] Appendix G. p. 92a, 101a.

[97] 442 U.S. 653 (1979), Appendix G, 107a, 117a.

[98] *Supra.*, p. 14-16, Appendix F p. 52a, 79a, IV. It has been repeatedly held that Petitioner Tribe as a riparian owner, holds title to those accretions *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (CA 8, 1970); *United States v. Flower*, 108 F.2d 298 (CA 8, 1939); *Wilson v. Omaha*, 442 U.S. 653 (1979). *See*, *United States v. Claridge*, 416 F.2d 939 (CA 9, 1969).

declared that Petitioner Tribe has the obligation of proving that "westward movements" of the Missouri River across the eastern segment of the lands within the constricted complaint in *United States v. Wilson* were avulsive. The Court of Appeals, moreover, affirmed the district court's refusal to enter findings and accepted—in lieu of findings—the district court's declaration that: "Nothing would be gained by recataloguing the evidence here."[99]

The only findings ever entered on the subject of avulsions were prepared by Respondents and adopted verbatim by the district court at the conclusion of the original trial on the merits in 1976, which findings were reversed by the Court of Appeals.[100] The district court, in its Memorandum Opinion here for review, justified its failure to enter findings respecting title to the 700 acres, to which the Court of Appeals refers, concluding that " . . . no party can meet the burden of proving accretion or avulsion."[101] Petitioner Tribe proved that the avulsions that severed the Blackbird Bend Meander Lobe from the Omaha Indian Reservation in the State of Nebraska transpired largely beyond the extremities of the Barrett Meander Line.[102] As a consequence, the Court of Appeals imposed an impossible burden upon Petitioner Tribe by its mandate with which the district court did not and could not comply.

The Court of Appeals, in grave error, attempted to substitute for findings its conclusion that the evidence in the proceedings had been subjected to " . . . extensive prior scrutiny." That conclusion violates Rule 52(a) FRCP, which requires the district court to "find the facts specially and state separately its conclusions of law thereon."[103]

Petitioner Tribes
Right to Registry Fund

The district court by its June 30, 1987 Order concurred with Petitioner Tribe in its assertion that its "profits" held in

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[99] *Supra* p. 16.
[100] *Supra*. p. 13.
[101] *Supra*. p. 16.
[102] *Supra*. p., Plate II, p. 10.
[103] *Supra*. p., 6.

the escrow account [registry fund] which were derived from the Tribe's farming operations could not legally be seized by the Department of Justice, declaring that:

> Tribe will not be penalized for the government's failure for approximately 50 years to promptly seek quiet title to the trust lands. This result is an equitable balance between the Tribe's right to rents from the trust land and the government's duty to pay for improvements made prior to June 5, 1975. Accordingly the court will amend its judgment with respect to the court registry fund.[104]

The Court of Appeals reversed the district court and wholly without authority and entirely without precedent authorized the attorneys of the Department of Justice to seize and take Petitioner Tribe's profits from its farming operations.[105] It did so in total disregard of the rationale adopted by the district court to preserve and to protect the rights, interests, and property of the Tribe. Contrary to fact, the Court of Appeals declared that there is no showing that ". . . the Omaha Indian Tribe suffered in any way . . . ." due to the failure of the government to initiate a suit to quiet title.

The district court precluded the showing of damages in its *sua sponte* order.[106] Petitioner Tribe has asserted a substantial claim for damages of unpaid rentals against Respondents. That fact explains the incredible statement of the Court of Appeals that Petitioner Tribe "had not suffered in any way." The district court, however, granted the Tribe's injunction against Respondent due to the irreparable damage the Tribe would suffer "absent issuance of an injunction."[107] That injunction remained in effect until the May 29, 1987 final judgement and decree.[108]

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[104] Appendix B, "p.16a, 34a-35a," June 30, 1987 Order.

[105] Appendix C., p. 37a, 44a; Appendix RR, p. 462a, denial of Petitioner Tribe's request to recuse Chief Judge Lay.

[106] Appendix GG., p. 403a., 405.

[107] Appendix M., p. 256a, 259a.

[108] Appendix B., p. 16a, 34a-35a, as Amended by the June 30, 1987 Order.

It is manifest that the forced fraudulent representation of Petitioner Tribe by attorneys in the Department of Justice has resulted in ongoing irreparable damage, all as reviewed above. Not only did the Court of Appeals err in regard to the facts, it likewise erred in regard to the law. Neither the Court of Appeals nor Congress can seize the Tribe's property without payment of just compensation.[109] The sanctity of Petitioner Tribe's property rights and interests against misconduct of agents of the trustee is too well established for question. The Supreme Court in its *Shoshone* Decision condemned the violation of tribal rights by agents of the trustee by declaring: "Spoliation is not management."[110]

On repeated occasions the Supreme Court condemned the seizure of tribal property by agents of the trustee, as here.[111]

In the district court and in the Court of Appeals, Petitioner Tribe has directed its charges against Messrs. Flint, Hultman, and James J. Clear, attorney, Department of Justice. Mr. Clear appeared in the trial on the merits and actively participated in the forced, fraudulent representation. Mr. Clear's status was adequately described when the presiding judge declared that his presence in the courtroom was "mind boggling" but that all Mr. Clear was doing was carrying out orders.

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[109] Constitution of the United States, Fifth Amendment; "No person shall be . . . deprived of . . . property, without due process of law nor shall private property be taken for public use, without compensation."

[110] *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1937).

[111] *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 (1902); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1917); *Choate v. Trapp*, 224 U.S. 665, 677 (1912); *United States v. Cook*, 19 Wall. 591 (1873).

CONCLUSION

Petitioner Omaha Indian Tribe respectfully prays the Supreme Court to grant this petition, thus granting Petitioner Tribe the right to be heard on issues critical to its survival.

Respectfully submitted,

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Dated: February 28, 1989

No. 88-1426

Supreme Court, U.S.
FILED
FEB 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

HAROLD JACKSON AND OTIS PETERSON AND THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Respondents.

* * * *

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, JOHN R. WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R.G.P., INC., AN IOWA CORPORATION, HAROLD JACKSON, OTIS PETERSON, DARRELL L. HAROLD, AND LUEA SORENSON, STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

Omaha Indian Tribe, Treaty of 1854 with the United States of America (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) as amended,

Petitioner,

v.

Harold Jackson and Otis Peterson and the District Court of Iowa in and for Monona County,

Respondents.

* * * *

Omaha Indian Tribe, Treaty of 1854 with the United States of America (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) as amended,

Petitioner,

v.

Agricultural & Industrial Investment Company; John R. Wilson; Charles E. Lakin, Florence Lakin; R.G.P., Inc., an Iowa Corporation; Harold Jackson; Otis Peterson; Darrell L., Harold, and Luea Sorenson; State of Iowa and Iowa Department of Natural Resources,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES of America, Plaintiff,

v.

Roy Tibbala WILSON, *et al.*,

Defendants.

OMAHA INDIAN TRIBE, Organized Indian Tribe pursuant to Act of June 18, 1934 (48 Stat. 984) as amended, Plaintiff.

v.

HAROLD JACKSON and OTIS P PETERSON and the District Court of Iowa In and For Monona County, Defendants.

OMAHA INDIAN TRIBE, etc.,

Plaintiffs.

v.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY, *et al.*,

Defendants

Nos. C-75-1024, C-75-1026 and C-75-1067.

United States District Court, N.D. Iowa, W.D.

Jan. 13, 1984.

James J. Clear, Dept. of Justice, Land & Natural Resources Div., Washington, D.C., for United States of America.

William H. Veeder, Washington, D.C., for Omaha Indian Tribe.

Robert J. Becker, Donald Buresh, Omaha, Neb., for Roy Tibbals Wilson.

Peter J. Peters, Council Bluffs, Iowa, for RGP, Inc. and Otis Peterson.

Elizabeth M. Osenbaugh, Asst. Atty. Gen., Thomas J. Miller, Atty. Gen., John P. Sarcone, Asst. Atty. Gen., Des Moines, Iowa, for State of Iowa and Iowa State Conservation Com'n.

Maurice Nieland, Sioux City, Iowa, for Harold Sorenson and Luea Sorenson.

BOGUE, Chief Judge.

THE DISPUTE

The extensive history of this dispute indicates that it may die of old age before it can be sucessfully adjudicated. This case was filed in 1976. Originally, it involved approximately 11,000 acres of land adjacent to the Missouri River in an area known as Blackbird Bend. The issues were severed, however, and initially, the land area involved was confined by the Court to an area known as the Barrett Survey Area which contains approximately 2900 acres. After chipping away at the issues involved in this dispute, only, ownership of approximately 700 acres of that land is still in question. Other remaining issues must await settlement of the title question.

Title to 2200 of the 2900 acres in dispute was ordered quieted by the Eighth Circuit Court of Appeals based on appointment of burden of proof and a presumption of title based on the failure of a party to meet its burden. This Court must decide for the third time whether the party having the burden of proof has succeeded. Ultimately, whether any party prevails on the merits must be settled. This Court holds that again the parties with the burdens of proof failed and therefore lose.

FACTS

For detailed discussions of the facts see the previous opinions in this dispute.[1] *Omaha III*, 707 F.2d 304 (8th Cir.1982); *Blackbird Bend II*, 523 F.Supp. 874 (N.D.Ia 1981; *Omaha II*, 614 F.2d 1153 (8th Cir. 1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); *Omaha I*, 575 F.2d 620 (8th Cir.1978); *Blackbird Bend I*, 433 F.Supp. 57, 67 (N.D.1a.1977).

Initially, this case was a classic accretion versus avulsion case. If, on the merits, the Court found that the Missouri River moved by avulsion, then title would be quieted in the Tribe. Conversely, if the Court found movement by accretion, title would be quieted in the Defendants. Of course, a multitude of combinations were also possible. However, time and evidence proved too much. Twice this Court held that all relevant movements of the Missouri River were through accretion. Twice, the Court of Appeals characterized these findings as an "educated guess" and extremely "speculative."*Omaha I*, 575 F.2d at 648; *Omaha II*, 614 F.2d at 1160. The Court of Appeals overturned the fact findings as clearly erroneous. *Omaha II*, 614 F.2d at 1160.

After the Court of Appeals issued its mandate in *Omaha III*, this Court directed the parties to submit Post-Appeal Findings and Conclusions. See Order filed July 18, 1983. The parties again painstakingly prepared proposed findings and conclusions. See Proposed Post-Appeal Findings of Fact and Conclusions of Law filed by: the State of Iowa, and the Iowa Conservation Commission; the United States; the Omaha Indian Tribe; and Wilson, Lakin, RGP Inc. and Peterson.

The parties again point to the evidence in the record which purportedly supports their respective positions concerning accretion and avulsion. The Eighth Circuit, of course, has foreclosed any finding of accretion. The question remaining is whether the Tribe can prove avulsions by a preponder-

[1] The Court will refer to the Court of Appeals' former decisions as *Omaha I, Omaha II, and Omaha III*. The Court will refer to its own decisions as *Blackbird Bend I and Blackbird Bend II*

ance of the evidence. The Court of Appeals disclaimed any opinion on the question:

> Although we indicated the landowners' proof was speculative whether the river moved by avulsion or accretion in both *Omaha I* and *Omaha II*, we did not assess the evidence in terms of whether the Tribe carried its burden of proof that there was avulsive movement to sustain the claim of the Tribe.

Omaha III, 707 F.2d at 309.

Reduced to its simplest terms, the issue becomes whether considering the evidence and the rulings of the Court of Appeals, the river banks were washed away particle by particle and likewise deposited elsewhere, or whether the thalweg moved by jumps. In *Blackbird Bend I*, the Court held that its finding of accretion was "supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion." 433 F.Supp. at 67. The Eighth Circuit held that this was based on an erroneous definition of avulsion. However, the Court subsequently confronted the same question in *Blackbird Bend II* after the Court of Appeals ruled on the proper definition of avulsion and again found that all river movements were accretive. 523 F.Supp. at 899. The Court of Appeals did not hold that the Court was again wrong.

The Court has reviewed the extensive Proposed Findings and Conclusions. Nothing is gained by recataloguing the evidence here. The Court will not alter its view of the evidence. The Court of Appeals has foreclosed that view becoming the foundation of a decision. As a result of this Court's view and the Court of Appeals mandates, no party can meet its burden of proving accretion or avulsion. This case then turns on the questions of law which are settled.

BURDEN OF PROOF

In *Blackbird Bend I*, the Court examined the law and held that 25 U.S.C. § 194 [Section 194] did not apply to this case.[2] 433 F.Supp. at 57, 66. The Eighth Circuit and Supreme Court agreed that this was error. *Omaha I*, 575 F.2d 620, 633; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2429, 2538, 61 L.Ed.2d 153 (1979). The Eighth Circuit and the Supreme Court disagreed on which defendants were "white persons" subject to Section 194. The Eighth Circuit held that all defendants were "white persons" subject to Section 194. 575 F.2d at 633. However, the Supreme Court held that the State of Iowa, a sovereign, was not a "white person". 99 S.Ct. at 2538. The burden of proof was, therefore, shifted to all defendants except the State of Iowa.

This simple shifting of the burden of proof became critical when the Court of Appeals overturned this Court's fact findings.[3] The Tribe, as the Plaintiff in this action, would, under normal circumstances have the burden to prove its case. But, Section 194 operated to place the burden of proof on the private Defendants. The Tribe, as Plaintiff, retained its burden of proving its title to land claimed by the State of Iowa.

Omaha III further clarified the effect of Section 194. The Court of Appeals examined how Section 194 affected the burden of proof concerning the land which had been fee patented.

> Thus, as in the controversy involving the State, we deem it important that the Tribe must carry its burden of proof of rightful ownership as to this land. Because Section 194 is not applicable to these

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[2] 25 U.S.C. § 194 states:
In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a *presumption* of title in himself from the fact of previous possession or ownership. (emphasis added)

[3] In *Blackbird Bend I*, this Court did place the burden on Plaintiffs. However, the Court also stated that this burden allocation was in no way dispositive. The Court was convinced that its findings were supported by a preponderance of the evidence. 433 F.Supp. at 67.

> 400 acres, it is clear that the burden of proof does not rest on the landowners.

707 F.2d at 309.

The Court of Appeals in a footnote, however, delegated another factual task to the Court to be decided before assignment of the burden can be settled.

> The record is not clear as to which lands within the disputed 700 acres were divested by the Indian Tribe and the government and which were not. The Tribe contends some of the area was allotted land relinquished back to the Tribe. *See* Plate I. Assuming the Tribe can establish that land was relinquished back to the Tribe, if the land is not otherwise claimed by the State of Iowa, title to such relinquished land should be quieted in the Tribe, as trust land as we ruled in *Omaha II*.

707 F.2d at 309, n. 8.

There appears to be no dispute on which parcels of land were allotted and relinquished and on which parcels patents were issued and later cancelled. *See* Proposed Findings of the United States at p. 3-5; Proposed Findings of the State of Iowa at p. 1-3; Memorandum of Defendants Wilson, Lakin, RGP, Inc., and Peterson at p. 1-3; Memorandum of Points and Authorities of Omaha Indian Tribe at p. 15-16. The private Defendants further concede that unless patented, the lands never left trust status. Memorandum of Wilson, et al. at p. 2. However, the United States indicates that portions of some of the parcels are not contained within the Barrett Survey Area. To the extent that any portion of any of these tracts is not contained within the Barrett Survey Area, this Court states no opinion as to the disposition of such land. Because of application of Section 194 and the directive of the Court of Appeals, all allotted lands contained in the 700 acres still in dispute, which were not fee patented and which are not otherwise claimed by the State of Iowa, will be quieted in the Tribe after survey and settlement of the improvements issue as discussed later in this Opinion. Therefore, all that is left for the Court to decide is the disposition of lands

claimed by the State of Iowa and parcels of land which are described in non-cancelled fee patents.

LANDS CLAIMED BY IOWA

Because this Court in *Blackbird Bend II* determined that all movements of the Missouri River over the Barrett Survey Area were accretive, the Court concluded that the Western land must also belong to the Tribe as accretions to land ordered quieted in the Tribe by the Eighth Circuit. 523 F.Supp. at 899. In *Omaha III*, the Court of Appeals held that *Blackbird Bend II's* reasoning, while tempting, was again erroneous. 707 F.2d at 308. The Court of Appeals held that this reasoning allowed the Tribe to bootstrap its victory via Section 194. *Id.* The Court of Appeals concluded that Section 194 could have no part in settling the controversy against the state. 707 F.2d at 308.

Basically the Court of Appeals ordered the Tribe to return to the beginning. The Tribe must prove on the merits its entitlement to the eastern Barrett Survey land before this Court's holding that the western lands were accretions would have any legal significance.[4] This, of course, demands that the Tribe show that from 1879 to 1923 the original boundary of the reservation remained unchanged because all river movements in that time period were avulsive.[5] The Court holds that the Tribe cannot prevail against the State of Iowa as to any lands included in the 700 acres and claimed by the state because it cannot sustain its burden of proof.

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[4] As noted in the previous discussion in *Blackbird Bend II*, this Court stated:

> This Court does not deviate from its original judgement that the Missouri River moved over the Barret Survey—in all relevant periods—by accretion . . . 523 F.Supp. at 899.

[5] The *Omaha III* Court stated:

> We did not hold that the Tribe established that the original boundary to the reservation remained unchanged by reason of avulsive movements from 1879 to 1923, thereby establishing continuing ownership of the Tribe in the trust land. *We deem such proof essential for the Tribe . . . to establish [its] claim to the nontrust lands.*

707 F.2d at 310 (emphasis added).

FEE PATENT LANDS CLAIMED BY OTHER DEFENDANTS

The *Omaha III* Court imposed the identical burden of proof on the Tribe concerning fee patented lands claimed by the private Defendants. 707 F.2d at 309. Therefore, the discussion in the previous section of this Opinion fully applies here. The Tribe has the burden of proving by a preponderance of the evidence that the original boundary of the reservation remained the same because of avulsive movements of the Missouri River. For the reasons previously stated, the Court holds the Tribe failed to meet that burden.

QUIETING TITLE IN THE DEFENDANTS

The foregoing findings and conclusions preclude quieting title in the Tribe to any of the 700 acres in question here, except for the land which was allotted and later relinquished to the Tribe. Does foreclosing the Tribe from a quiet title decree automatically mean that title is quieted in the Defendants?

The Court of Appeals latest opinion stated:

> We therefore remand this case to allow the district court to determine whether the Tribe has met its burden of proof so defined herein. If it holds that the Tribe failed to meet its burden, it must then determine whether the private parties and the State of Iowa are entitled to have title to the tracts of land in controversy quieted in them.

Omaha III, 707 F.2d at 310.

This open-ended and unexplained directive seems to contemplate something more for the Defendants to prevail. The State of Iowa argues that because nothing more was required of the Tribe, failure of the Tribe to meet its burden should be sufficient here. However, the State's argument ignores a critical aspect of Section 194. Section 194 operates not only to shift the burden, but also to raise a presumption of title in the "Indian". *See supra* note 2. Of course, it is now settled that the Tribe is an "Indian" entitled to the

benefits of Section 194. *Omaha Indian Tribe*, 442 U.S. at 665-7, 99 S.Ct. at 2536-7. Thus, when the Court of Appeals ordered title quieted in the Tribe, it appears that its ruling was founded on the presumption afforded the Tribe by application of Section 194.

Defendants, to the extent that they succeed, prevail on the basis of imposition of the burden of proof on the Tribe. They benefit from no corresponding presumption of good title. Therefore, considering the basis of the Court of Appeals' Order, it seems proper to allow Defendants to prevail only "upon the strength of their own title rather than on the weakness of that of the [Tribe]". *See Omaha III*, 707 F.2d at 310, n. 9.

The Court has carefully reviewed the Proposed Findings and Conclusions and Memoranda of Law submitted by the parties. It appears that the Court should determine the rights of the parties under the pleadings and evidence, and grant the proper relief by determining the better title as between the parties to the proceeding, even though a non-party may later assert a title superior to all the parties. 65 AmJur.2d, *Quieting Title*, § 46.

The Tribe argues that even if it fails to meet its burden, that title cannot be quieted in any other party. *See Memorandum of Points and Authorities in Opposition to Defendants' Request to Have Title Quieted in Them.* The Tribe argues that all titles are defective because they "are predicated on trespass originating in 1925 with 'squatter' Joe Kirk." Id. at p. 4.

However, this argument presumes the Tribe prevailed on the merits and established that as to the Tribe, Joe Kirk was a "trespasser" or "squatter". The Tribe failed to prove entitlement to the land on the merits. At this point, the private Defendants have produced record titles. *See* Wilson Exhibits W, X, Y, Z, AA and BB. This is sufficient to quiet title as against the Tribe. *See e.g. U.S. v. Oregon*, 295 U.S. 1, 25-26, 55 S.Ct. 610, 620, 79 L.Ed. 1267 (1935); *Omaha III*, 707 F.2d at 310, n.9.

Likewise, the State of Iowa produced record title to the land it claims. See Exhibits M8, N8, O8 and T8. The title is not traceable to fee patents. However, it is better title than that produced by the Tribe. Therefore, the State of Iowa has presented a sufficient record to obtain a quiet title decree as against the Tribe. Because of the Court's disposition it is unnecessary to address the applicability of adverse possession.

IMPROVEMENTS

In *Omaha III*, the Court of Appeals held:

> [T]he the duty to pay for the value of improvements is an element of the government's own claim [and] a condition precedent to the right of the United States to recover . . .

707 F.2d at 312.

Therefore, it appears that quieting title in the land claimed by the Tribe must await disposition of the improvements issue and a survey of the parcels involved. The Court in its Order filed July 18, 1983 stated:

> After the Court rules on land ownership questions, the case will be transferred back to the Northern District of Iowa for further proceedings deemed necessary to resolve the improvement issues and all remaining motions.

This Court will hear any dispute which would arise from reversal of this Opinion. Otherwise, the case will be transferred to Judge McManus in accordance with this Court's Order filed July 18, 1983.

CONCLUSION

After eight years of litigation and appeals, land ownership in this case is not decided on the merits. All disputes involving the 2900 acres of land are settled simply by the apportionment of the burden of proof. The Tribe originally won its claim to 2200 acres because of the allocation of the burden which resulted from application of Section 194. The Court of Appeals held that the Defendants claiming the 2200 acres simply failed to meet their burden according to the Court of Appeals. The State of Iowa and Defendants claiming fee patent lands prevail here because of application of the burden of proof, absent the aid of Section 194. The Tribe failed to sustain its burden.

The Court happened upon an ancient legal maxim which appears appropriate here, "Idem est non probari et non esse; non deficit jus, sed probatio." Roughly translated, "What is not proved and what does not exist are the same; it is not a defect of the law, but of proof." Black's Law Dictionary, 5th ed. (1979).

This Opinion shall constitute the Court's findings of fact and conclusions of law.

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff.* vs. JOHN R. WILSON, *et al.*, *Defendants.*	C 75-4024
OMAHA INDIAN TRIBE, *etc.*, *Plaintiff.* vs. HAROLD JACKSON, *et al.*, *Defendants.*	C 75-4026 **FINAL JUDGMENT AND DECREE (filed May 30, 1987)**
OMAHA INDIAN TRIBE, *Plaintiff.* vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*, *Defendants.*	C 75-4067

The above actions were initially assigned to Chief Judge Edward J. McManus who entered a preliminary injunction on June 5, 1975, giving temporary possession of the land within the Barrett Survey to the Omaha Indian Tribe. The cases were then assigned to The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, for disposition on May 5, 1976. Judge Bogue transferred the cases back to Chief Judge Edward J. McManus on January 13, 1984.

Cases No. C 75-4024, No. C 75-4026, and the consolidated portion of No. C 75-4067 relating to the Barrett Survey

area, were tried to the court from November 1 to December 6, 1976, before Judge Bogue. Upon the evidence submitted by the respective parties and upon the entire record, Judge Bogue, upon remand from the Eighth Circuit Court of Appeals, *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), filed a memorandum opinion on January 13, 1984, *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984), constituting the court's findings of fact, conclusions of law and order, which are fully incorporated by reference herein except to the extent herein amended, modified or supplemented.

Pursuant to the court's order filed April 23, 1985, the Bureau of Land Management of the Department of the Interior conducted a final survey of those lands encompassed by or located within the 1867 Barrett Meander Line in the State of Iowa, the title to which shall be quieted in the United States as trustee for the Tribe. The metes and bounds descriptions were prepared from the survey of Fractional Tps. 24 N., Rs 10 and 11 E., Sixth Principal Meridian, Iowa and Nebraska, approved by the BLM on January 16, 1986, and approved by the court on June 11, 1986. The phrase "monument described in the official record" as used in this order refers to the monuments described in the field notes of said survey.

It is therefore.

ORDERED, ADJUDGED AND DECREED

1. Upon payment by the United States for improvements as set forth below, fee simple title shall be quieted in the United States as Trustee for the Omaha Indian Tribe as against the defendants in and to the following described lands:

> A + or - 1923.09 acre tract of land situated in Monona County, Iowa, to-wit:
>
> Commencing at the meander corner of sections 19 and 24, T. 84 N., Rs. 46 and 47 W., Fifth Principal Meridian, Iowa, thence S. 49°57' W., a distance of 39.42 chains, to the special meander corner on the north-south center line of fractional section 11, T.

24 N., R. 10 E., Sixth Principal Meridian, Iowa, which is the true point of beginning, thence

S. 36°38′ E., a distance of 25.01 chains, to the monument described in the official record, thence S. 53°08′ E., a distance of 23.22 chains, to the monument described in the official record, thence S. 63°34′ E., a distance of 6.74 chains, to the monument described in the official record, thence S. 79°44′ E., a distance of 40.65 chains, to the monument described in the official record, thence N. 84°17′ E., a distance of 40.20 chains, to the monument described in the official record, thence N. 88°13′ E., a distance of 40.02 chains, to the monument described in the official record, thence S. 87°08′ E., a distance of 40.05 chains to the monument described in the official record, thence S. 54°00′ E., a distance of 22.21 chains, to the monument described of in the official record, thence S. 10°02′ E., a distance of 20.26 chains, to the monument described in the official record, thence S. 10°59′ W., a distance of 20.32 chains, to the monument described in the official record, thence S. 23°16′30″ W., a distance of 21.83 chains, to the monument described in the official record, thence S. 34°42′ W., a distance of 15.81 chains, to the monument described in the official record, thence S. 70°59′ W., a distance of 21.18 chains, to the monument described in the official record, thence WEST, a distance of 19.98 chains, to the monument described in the official record, thence N. 79°04′ W., a distance of 20.41 chains, to the monument described in the official record, thence S. 85°13′ W., a distance of 20.03 chains, to the monument described in the official record, thence S. 81°00′ W., a distance of 12.42 chains, to the monument described in the official record, thence S. 89°59′ W., a distance of 27.74 chains, to the monument described in the official record, thence S. 87°33′

W., a distance of 40.04 chains, to the monument described in the official record, thence S. 82°19′30″ W., a distance of 0.406 chains, to the monument described in the official record, thence N. 45°13′00″ W., a distance of 0.454 chains, to the monument described in the official record, thence N. 66°58′12″ W., a distance of 5.036 chains, to the monument described in the official record, thence S. 81°39′12″ W., a distance of 2.139 chains, to the monument described in the official record, thence S. 62°22′30″ W., a distance of 2.290 chains, to the monument described in the official record, thence S. 49°38′06″ W., a distance of 3.898 chains, to the monument described in the official record, thence S. 78°31′12″ W., a distance of 0.347 chains, to the monument described in the official record, thence S. 82°19′30″ W., a distance of 2.700 chains, to the monument described in the official record, thence N. 82°29′12″ W., a distance of 8.130 chains, to the monument described in the official record, thence N. 67°26′54″ W., a distance of 3.892 chains, to the monument described in the official record, thence N. 57°41′42″ W., a distance of 7.074 chains, to the monument described in the official record, thence N. 41°51′54″ W., a distance of 7.781 chains, to the monument described in the official record, thence N. 9°44′18″ W., a distance of 11.428 chains, to the monument described in the official record, thence N. 10°36′36″ W., a distance of 0.055 chains, to the monument described in the official record, thence EAST, a distance of 0.280 chains, to the monument described in the official record, thence EAST, a distance of 20.00 chains, to the monument described in the official record, thence N. 0°09′ E., a distance of 20.00 chains, to the monument described in the official record, thence N. 89°59′

E., a distance of 19.94 chains, to the monument described in the official record, thence N. 0°01′ W., a distance of 20.00 chains, to the monument described in the official record, thence S. 89°59′ W., a distance of 39.76 chains, to the monument described in the official record, thence N. 0°19′ E., a distance of 40.00 chains, to the monument described in the official record, thence NORTH, a distance of 34.00 chains, to the monument described in the official record, to the true point of beginning.

A + or – 14.18 acre tract of land situated in Monona County, Iowa, to-wit:

Commencing at the meander corner of sections 19 and 24, T. 84 N., Rs. 46 and 47 W., Fifth Principal Meridian, Iowa, thence S. 26°53′ W., a distance of 111.42 chains, to the center west one-sixteenth section corner of fractional section 14, T. 24 N., R. 10 E., Sixth Principal Meridian, Iowa, which is the true point of beginning, thence

S. 89°59′00″ W., a distance of 3.778 chains, to the monument described in the official record, thence N. 1°12′30″ E., a distance of 1.971 chains, to the monument described in the official record, thence N. 9°01′30″ W., a distance of 2.699 chains, to the monument described in the official record, thence N. 14°23′06″ W., distance of 2.951 chains, to the monument described in the official record, thence N. 4°56′48″ E., a distance of 2.764 chains, to the monument described in the official record, thence N. 8°51′30″ E., a distance of 1.865 chains, to the monument described in the official record, thence N. 2°25′48″ W., a distance of 3.556 chains, to the monument described in the official record, thence N. 3°56′42″ W., a distance of 2.322 chains, to the monument described in the official record, thence N. 2°02′54″ E., a distance of

2.222 chains, to the monument described in the official record, thence N. 9°06′36″ E., a distance of 3.878 chains, to the monument described in the official record, thence N. 6°21′00″ E., a distance of 0.221 chains, to the monument described in the official record, thence N. 8°21′00″ E., a distance of 3.674 chains, to the monument described in the official record, thence N. 10°27′12″ E., a distance of 3.418 chains, to the monument described in the official record, thence N. 21°39′54″ E., a distance of 2.086 chains, to the monument described in the official record, thence N. 36°00′36″ E., a distance of 1.979 chains, to the monument described in the official record, thence N. 23°39′00″ E., a distance of 1.587 chains, to the monument described in the official record, thence N. 36°34′54″ E., a distance of 0.721 chains, to the monument described in the official record, thence S. 0°19′ W., a distance of 36.80 chains, to the monument described in the official record, to the true point of beginning.

A + or – 0.27 acre tract of land situated in Monona County, Iowa, to-wit:

Commencing at the meander corner of sections 19 and 24, T. 84 N., Rs. 46 and 47 W., Fifth Principal Meridian, Iowa, thence S. 64°05′ W., a distance of 44.38 chains, to the special meander corner on the east-west center line of fractional section 11, T. 24 N., R. 10 E., Sixth Principal Meridian, Iowa, which is the true point of beginning, thence

WEST, a distance of 1.820 chains, to the monument described in the official record, thence N. 2°18′42″ E., a distance of 2.966 chains, to the monument described in the official record, thence S. 29°51′00″ E., a distance of 3.416 chains, to the monument described in the official record, to the true point of beginning.

The United States shall make payment within 60 days from the entry of this judgment and decree, or the conclusion of any appeal therefrom, of the following amounts to the following defendants representing the value of permanent improvements made by such defendants or their predecessors in title to the above described lands as determined in the prior orders filed on September 8, 1986 and October 28, 1986 and upon the "Joint Motion and Stipulation of the United States and Defendants Wilson, Lakin, Jackson, Peterson and RGP Inc. Regarding Improvements Issue" filed on July 25, 1986, and the "Stipulation of Facts of the Plaintiff United States and the Defendants Wilson, Lakin, Jackson, Peterson, RGP Inc. and Sorenson in Lieu of Trial on Valuation of Improvements" filed on April 27, 1987;

John R. Wilson, ... Personal Representative of the Estate of Roy Tibbals Wilson, Deceased	$1,453,720.50
RGP Inc.....	$ 467,457.35

and that prejudgment interest shall be paid on said amounts from June 5, 1975, the date when the United States was placed in possession of the above described land by temporary injunction until judgment is entered at the rates of interest on judgments in effect from time to time during said period under the laws of Nebraska. Post judgment interest shall be paid pursuant to the United States Code.

2. Fee simple title shall be and is hereby quieted in the State of Iowa as against the United States and the Omaha Indian Tribe in and to the following described land:

> All that part of the East Half (E ½) of Section Ten (10), all that part of the West Half (W ½) of Section Eleven (11), all that part of the West Half (W ½) of Section Fourteen (14), all that part of the East Half (E ½) of Section Fifteen (15), all that part of the Northeast Quarter of the Northeast Quarter (NE ¼ NE ¼) of Section Twenty-Two (22), and all that part of the North Half (N ½) of Section Twenty-Three (23), all in Township Twenty-Four (24) North,

Range Ten (10) East of the Sixth (6th) Principal Meridian, Monona County, Iowa, described as commencing at the meander corner of Section Twenty-Four (24), Township Eighty-Four (84) North, Range Forty-Seven (47) West, and Section Nineteen (19), Township Eighty-Four (84) North, Range Forty-Six (46) West at the monument described in the official record, thence South 49°57'00' West 2601.72 feet to the monument described in the official record, thence North 58°29'00" West 754.38 feet to the monument described in the official record, thence West 120.12 feet to the Point of Beginning to the monument described in the official record, thence South 02°18'42" West 4.09 feet to the monument described in the official record, thence South 15°16'40" West 191.41 feet, thence South 01°43'20" East 174.60 feet, thence South 05°12'40" West 179.76 feet, thence South 13°40'40" East 52.72 feet, thence South 07°01'40" East 112.46 feet, thence South 02°48'00" West 257.10 feet, thence South 06°30'00" West 173.51 feet, thence South 01°20'00" West 142.12 feet, thence South 14°35'00" West 163.76 feet, thence South 05°55'40" West 248.81 feet, thence South 14°16'40" West 242.40 feet, thence South 14°06'40" West 294.83 feet, thence South 20°59'40" West 125.24 feet, thence South 10°12'00" West 85.35 feet, thence South 19°56'00" West 298.73 feet, thence South 36°32'20" West 205.20 feet to the monument described in the official record, thence South 36°34'54" West 47.59 feet to the monument described in the official record, thence South 23°39'00" West 104.74 feet to the monument described in the official record, thence South 36°00'36" West 130.61 feet to the monument described in the official record, thence South 21°39'54" West 137.68 feet to the monument described in the official record, thence South 10°27'12" West 225.59 feet to the monument described in the official record, thence South 08°21'00" West 257.07

feet to the monument described in the official record, thence South 09°06'36" West 255.95 feet to the monument described in the official record, thence South 02°02'54" West 146.65 feet to the monument described in the official record, thence South 03°56'42" East 153.25 feet to the monument described in the official record, thence South 02°25'48" East 234.70 feet to the monument described in the official record, thence South 08°51'30" West 123.09 feet to the monument described in the official record, thence South 04°56'48" West 182.42 feet to the monument described in the official record, thence South 14°23'06" East 194.77 feet to the monument described in the official record, thence South 09°01'30" East 178.13 feet to the monument described in the official record, thence South 01°12'30" West 145.14 feet to the monument described in the official record, thence South 20°49'00" East 159.95 feet, thence South 17°02'30" East 377.48 feet, thence South 04°38'30" East 155.96 feet, thence South 16°45'30" West 207.93 feet, thence South 46°10'30" West 122.15 feet, thence South 60°42'30" West 135.69 feet, thence South 50°41'30" West 21.16 feet, thence South 52°33'00" East 406.25 feet, thence South 71°58'30' East 351.45 feet, thence South 61°37'30' East 274.63 feet, thence South 67°20'00" East 415.31 feet, thence South 41°30'30" East 222.23 feet, thence South 24°19'30" East 271.25 feet, thence South 10°36'36" East 546.48 feet, thence South 09°44'18" East 754.25 feet, thence South 41°51'54" East 513.55 feet, thence South 57°41'42" East 466.88 feet, thence South 67°26'54" East 256.87 feet, thence South 82°29'12" East 536.15 feet, thence North 82°19'30" East 178.20 feet, thence North 78°31'12" East 22.90 feet, thence North 49°38'06" East 257.27 feet, thence North 62°22'30" East 151.14 feet, thence North 81°39'12" East 141.17 feet, thence South 66°58'12" East 332.38 feet, thence South 45°13'00" East 29.96 feet, thence South 82°19'30" West

2635.67 feet, thence South 54°51′30″ West 1111.44 feet, thence South 36°21′13″ West 256.84 feet to the 1943 Iowa-Nebraska State Compact Line, thence following said Compact Line North 62°00′00″ West 500.00 feet, thence North 56°10′00″ West 500.00 feet, thence North 48°20′00″ West 500.00 feet, thence North 41°36′00″ West 500.00 feet, thence North 34°00′00″ West 500.00 feet, thence North 29°40′00″ West 500.00 feet, thence North 23°56′00″ West 500.00 feet, thence North 18°40′00″ West 500.00 feet, thence North 16°28′00″ West 500.00 feet, thence North 14°30′00″ West 500.00 feet, thence North 11°36′00″ West 550.00 feet, thence North 09°20′00″ West 500.00 feet, thence North 07°13′00″ West 500.00 feet, thence North 04°41′00″ West 500.00 feet, thence North 00°20′00″ West 500.00 feet, thence North 04°08′00″ East 500.00 feet, thence North 08°12′00″ East 500.00 feet, thence North 12°14′00″ East 500.00 feet, thence North 16°38′00″ East 500.00 feet, thence North 22°41′00″ East 500.00 feet, thence North 26°01′00″ East 499.87 feet, thence North 29°48′00″ East 1,000.00 feet, thence North 30°24′00″ East 500.00 feet, thence North 28°47′00″ East 500.00 feet, thence North 26°43′00″ East 500.00 feet, thence North 23°36′00″ East 500.00 feet, thence North 21°18′00″ East 449.97 feet, thence leaving said Compact Line South 33°22′00″ East 199.32 feet to the monument described in the official record, thence South 29°51′00″ East 1775.40 feet to the monument described in the official record, thence South 02°18′42″ West 195.76 feet to the Point of Beginning containing 672.93 acres, more or less.

The United States and the Omaha Indian Tribe are forever barred and estopped from having or claiming any prior right, title or interest in said land adverse to the State of Iowa, its successors and assigns, and are enjoined from interfering with the State of Iowa, its successors or assigns in their ownership and peaceable possession of said land.

3. Fee simple title shall be and is hereby quieted in John R. Wilson, Personal Representative of the Estate of Ray Tibbals Wilson, Deceased, as against the United States and the Omaha Indian Tribe in and to the following described land:

> All that part of the East Half of the Northwest Quarter (E ½ NW ¼), that part of the Northeast Quarter of the Southwest Quarter (NE ¼ SW ¼), and that part of the Southeast Quarter (SE ¼), Section Fourteen (14), Township Twenty-Four (24) North, Range Ten (10) East of the Sixth (6th) Principal Meridian, Monona County, Iowa, described as commencing at the meander corner of Section Twenty-Four (24), Township Eighty-Four (84) North, Range Forty-Seven (47) West and Section Nineteen (19), Township Eighty-Four (84) North, Range Forty-Six (46) West at the monument described in the official record, thence South 49°57'00" West 2601.72 feet to the monument described in the official record, thence South 2244.00 feet to the monument described in the official record, thence South 00°19'00" West 1041.35 feet to the Point of Beginning, thence South 00°19'00" West 1598.65 feet to the monument described in the official record, thence North 89°59'00" East 2624.16 feet to the monument described in the official record, thence South 00°01'00" East 1320.00 feet to the monument described in the official record, thence South 89°59'00" West 1316.04 feet to the monument described in the official record, thence South 00°09'00" West 1320.00 feet to the monument described in the official record, thence West 1034.87 feet, thence North 06°38'50" West 1222.94 feet, thence North 27°44'10" West 1751.35 feet, thence North 08°08'20" West 1488.53 feet, thence South 89°59'30" East 906.06 feet to the Point of Beginning containing 151.15 acres, more or less.

The United States and the Omaha Indian Tribe are forever barred and estopped from having or claiming any prior right,

title or interest in said land adverse to John R. Wilson, Personal Representative of the Estate of Roy Tibbals Wilson, Deceased, his heirs, successors and assigns and are enjoined from interfering with John R. Wilson, Personal Representative of the Estate of Roy Tibbals Wilson, Deceased, his heirs, successors or assigns in their ownership and peaceable possession of said land.

4. Fee simple title shall be and is hereby quieted in RGP Inc. as against the United States and the Omaha Indian Tribe in and to the following described land:

> All that part of East Half of the Southwest Quarter (E ½ SW ¼) of Section Eleven (11), and all that part of the Northeast Quarter of the Northwest Quarter (NE ¼ NW ¼) of Section Fourteen (14), all in Township Twenty-Four (24) North, Range Ten (10) East of the Sixth (6th) Principal Meridian, Monona County, Iowa, described as commencing at the meander corner of Section Twenty-Four (24), Township Eighty-Four (84) North, Range Forty-Seven (47) West and Section Nineteen (19), Township Eighty-Four (84) North, Range Forty-Six (46) West at the monument described in the official record, thence South 49°57'00" West 2601.72 feet to the Point of Beginning to the monument described in the official record, thence South 2244.00 feet to the monument described in the official record, thence South 00°19'00" West 1041.35 feet, thence North 89°59'30" West 1320.00 feet, thence North 00°19'00" East 829.58 feet to the monument described in the official record, thence North 36°32'20" East 205.20 feet, thence North 19°56'00" East 298.73 feet, thence North 10°12'00" East 85.35 feet, thence North 20°59'40" East 125.24 feet, thence North 14°06'40" East 294.83 feet, thence North 14°16'40" East 242.40 feet, thence North 05°55'40" East 248.81 feet, thence North 14°35'00" East 163.76 feet, thence North 01°20'00" East 142.12 feet, thence North 06°30'00" East 173.51 feet, thence North 02°48'00" East 257.0 feet, thence North 07°01'40" West 112.46

feet, thence North 13°40'40" West 52.72 feet, thence North 05°12'40" East 179.76 feet, thence North 01°43'20" West 174.60 feet, thence North 15°16'40" East 191.41 feet, thence North 02°18'42" East 4.09 feet to the monument described in the official record, thence East 120.12 feet to the monument described in the official record, thence South 58°29'00" East 754.38 feet to the Point of Beginning containing 83.26 acres, more or less.

The United States and the Omaha Indian Tribe are forever barred and estopped from having or claiming any prior right, title or interest in said land adverse to RGP Inc., its successors and assigns and are enjoined from interfering with RGP Inc., its successors and assigns in their ownership and peaceable possession of said land.

5. Fee simple title shall be and is hereby quieted in Charles E. Lakin and Florence Lakin as against the United States and the Omaha Indian Tribe in and to the following described land:

All that part of the East Half of the Northwest Quarter (E 1/2 NW 1/4), that part of the Southwest Quarter (SW 1/4), and that part of the West Half of the Southeast Quarter (W 1/2 SE 1/4), Section Fourteen (14), Township Twenty-Four (24) North, Range Ten (10) East of the Sixth (6th) Principal Meridian, Monona County, Iowa, described as commencing at the meander corner of Section Twenty-Four (24), Township eighty-Four (84) North, Range Forty-Seven (47) West and Section Nineteen (19), Township Eighty-Four (84) North, Range Forty-Six (46) West at the monument described in the official record, thence South 49°57'00" West 2601.72 feet to the monument described in the official record, thence South 2244.00 feet to the monument described in the official record, thence South 00°19'00" West 1041.35 feet, thence North 89°59'30" West 906.06 feet to the Point of Beginning, thence South 08°08'20" East 1488.53 feet, thence South 27°44'10"

East 1751.35 feet, thence South 06°38′50″ East 1222.94 feet, thence West 303.61 feet to the monument described in the official record, thence North 10°36′36″ West 542.00 feet to the monument described in the official record, thence North 24°19′30″ West 271.25 feet, thence North 41°30′30″ West 222.23 feet, thence North 67°20′00″ West 415.31 feet, thence North 61°37′30″ West 274.63 feet, thence North 71°58′30″ West 351.45 feet, thence North 52°33′00″ West 406.25 feet to the monument described in the official record, thence North 50°41′30″ East 21.16 feet, thence North 60°42′30″ East 135.69 feet, thence North 46°10′30″ East 122.15 feet, thence North 16°45′30″ East 207.93 feet, thence North 04°38′40″ West 155.96 feet, thence North 17°02′30″ West 377.48 feet, thence North 20°49′00″ West 159.95 feet, thence North 01°12′30″ East 15.05 feet to the monument described in the official record, thence North 89°59′00″ East 249.35 feet to the monument described in the official record, thence North 00°19′00″ East 1599.22 feet, thence South 89°59′30″ East 413.94 feet to the Point of Beginning containing 71.34 acres more or less.

The United States and the Omaha Indian Tribe are forever barred and enjoined from having or claiming any prior right, title or interest in said land adverse to Charles E. Lakin and Florence Lakin, their heirs, successors and assigns and are enjoined from interfering with Charles E. Lakin and Florence Lakin, their heirs, successors and assigns in their ownership and peaceable possession of said land.

6. The preliminary injunction, filed June 5, 1975, which gave temporary possession of the lands within the Barrett Survey to the Omaha Indian Tribe is hereby dissolved, vacated and set aside.

7. The trespass claims of the Omaha Indian Tribe in that portion of C 75-4067 which has been consolidated with C 75-4024 and C 75-4026 are dismissed with prejudice pursuant to the court's order of December 1, 1986.

8. The registry fund held in escrow accounts by the Clerk of Court pursuant to the June 5, 1975 preliminary injunction, shall remain subject to the jurisdiction of the court pending audit by the Inspector General of the Department of the Interior in accordance with the court's order filed May 28, 1987, and any distribution of such funds shall be subject to the further order of the court.

The amount of net profits derived from the lands which are quieted in the United States as Trustee for the Omaha Indian Tribe and held by the Clerk of Court pursuant to the June 5, 1975 preliminary injunction shall be available to the United States to partially satisfy its obligation to pay for improvements.

9. The State of Iowa shall be entitled to recover its costs herein and the same are taxed against the United States and the Omaha Indian Tribe. The United States and the Omaha Indian Tribe shall pay their own costs and defendants Wilson, Lakin, Jackson, RGP Inc., Peterson and Sorenson shall pay their own costs.

10. To the extent that there remain certain claims among the parties in the unconsolidated portion of C 75-4067 which have not been adjudicated herein, the court certifies, pursuant to Rule 54(b) FRCP that there is no just reason for delay and that this final judgment and decree shall constitute a final judgment which is approved as to form as to the claims of the parties adjudicated herein and direction is therefore made for the entry of judgment in accordance therewith.

May 29, 1987.

EDWARD J. MCMANUS

Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs. JOHN R. WILSON, *et al.*, *Defendants.*	C 75-4024
OMAHA INDIAN TRIBE, *etc.*, *Plaintiff,* vs. HAROLD JACKSON, *et al.*, *Defendants.*	C 75-4026 ORDER (filed June 30, 1987)
OMAHA INDIAN TRIBE, *Plaintiff,* vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*, *Defendants.*	C 75-4067

This matter is before the court on defendant RGP, Inc.'s unresisted application for allowance of costs and attorney fees, filed June 4, 1987; on the Omaha Indian Tribe's resisted motion for new trial, filed June 10, 1987; on the United States' report on proposed audit, filed June 12, 1987; and pursuant to the court's May 1, 1987 order that parties submit briefs and arguments on the issue of sanctions. Sanction granted; motion for new trial denied; and judgment amended.

Sanctions

On January 9, 1986, the Tribe filed a motion for summary judgment against three attorneys for the United States. In its February 21, 1986 order, the court found that the attorneys were not parties to this lawsuit and denied the motion as

frivolous. Sanctions were imposed on the Tribe's attorney, William H. Veeder, pursuant to FRCP 11, 28 USC § 1927 and Local Rule 2.2.8. Determination of the appropriate sanction was stayed until the final pre-trial conference. No final pre-trial conference was necessary and the parties have been given the opportunity to file supplemental briefs and arguments pursuant to the court's oral order of May 1, 1987. Expenses were incurred by the following parties: Iowa—$325.00; RGP, Inc. and Otis Peterson—$360.00, Wilson, Lakin & Jackson—$749.70, and the United States—$1,875.00. The Tribe's attorney has not contested these amounts; therefore, they will be granted as sanctions.

On September 16 and 17, 1986, Iowa and the private defendants sought sanctions and to compel discovery for the Tribe's failure to answer interrogatories and produce documents. The court granted the motion to compel and ordered the Tribe and its attorney to pay reasonable expenses caused by the Tribe's failure to respond to the discovery request. Jackson, Lakin and Wilson reasonably incurred expenses of $251.00 and Iowa reasonably incurred expenses of $212.50. Neither the Tribe nor its attorney have contested these amounts; therefore, they will be granted as sanctions.

On February 2 and 20, Iowa sought an order to show cause why the Tribe and Doran Morris should not be held in contempt. After notice and hearing, the court held the Tribe and Morris in contempt and ordered the Tribe to pay Iowa its reasonable costs and attorney fees incurred in bringing the contempt action. Iowa reasonably incurred expenses of $14,807.71 in bringing the contempt action and the Tribe has not contested such expenses. Accordingly the expenses are granted.

On April 21 and 23, 1987, Iowa and the private defendants sought an order to show cause why the Tribe and some of its members and employees should not be held in contempt. After notice and hearing, the court held the Tribe and eleven of its members in contempt, incarcerated the tribal members and imposed a daily fine of $10,000.00 on the Tribe. On May 22, 1987, the court ordered the Tribe to pay defendants

all reasonable costs and attorney fees incurred in bringing the contempt action. Iowa reasonably incurred expenses of $6,558.37; defendants Wilson, Lakin and Jackson reasonably incurred expenses of $6,556.33; and defendant RGP, Inc. reasonably incurred expenses of $2,598.34. The Tribe has not contested such expenses, accordingly, the expenses are granted.

Motion for New Trial

The Omaha Indian Tribe moves for a new trial based upon the court's refusal to hear the Tribe's fraud charges or alternatively to amend judgment, correct patent errors and to make part of the record the amicus curiae statement of the National Council of Churches and Center for Constitutional Rights.[1]

The court has refused the Tribe's prior requests for a hearing on its charges of fraud. The Tribe has not provided the court with any new information which would justify a new trial pursuant to Rule 59.

The Tribe seeks to amend the judgment to quiet title in the Tribe to the lands claimed by "defendant Harold M. Sorenson *et ux, et al.*" Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson (Sorensons) are defendants in the portion of No. C 75-4067 which was consolidated with Nos. C 75-4024 and C 75-4026. The consolidated case (Wilson) includes all land within the Barrett Survey area; accordingly, the claims of the Sorensons to land within the Barrett Survey have been adjudicated and resolved. The Sorensons had no land quieted in them. The land quieted in the United States as trustee for the Omaha Indian Tribe was quieted against the Sorensons, as well as against the other defendants. The land cannot be quieted in the Tribe itself since the land is held by the United States as trustee for the Tribe.

The Tribe also asserts that the court improperly quieted title in the State of Iowa. Title was quieted in the State of

[1] The amicus curiae statements, attached to the Tribe's motion as Appendices A and B are now part of the record.

Iowa to the lands claimed by Iowa because the Tribe and the United States failed to meet their burden of proof establishing superior title against Iowa. The Tribe's claim that adequate findings of fact and conclusions of law were not made is also without merit.

The Tribe next challenges the court's decision to make the net profits derived from the lands which are quieted in the United States as Trustee for the Omaha Indian Tribe and held by the Clerk of Court, pursuant to the June 5, 1975 preliminary injunction, available to the United States to partially satisfy its obligation to pay for improvements. The United States argues that the Tribe has waived any objection because it failed to object to the proposed judgment or the Unites States' request. In addition the government argues that it is entitled to reimbursement from the trust for its expenditures as trustee for the purpose of the trust.

The court's preliminary injunction, filed June 5, 1975, ordered the Tribe to deposit with the Clerk of Court the net profits received for crops harvested from the Barrett Survey lands, together with a report of receipts and disbursements. This order served to protect the defendants from the possibility of financial injury until quiet title could be finally determined.

Although the United States holds the land as trustee for the benefit of the Tribe, the Tribe has the right of use and occupancy to the tribal lands. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 622 n.2 (8th Cir. 1978). The court allowed the United States to offsets rents and profits and removed timber against the value of improvements. However, the offset is limited to rents and profits and removed timber prior to June 5, 1975, the valuation date for improvements. The government's argument, carried to its logical conclusion would force the Tribe to pay all subsequent net profits to the government until it is reimbursed for the entire value of the improvements. It cannot prevail. On June 5, 1975, the Tribe was given possession of the Barrett Survey area. All net profits received since that date from leasing the land which has been quieted in the United States as trustee for the benefit

of the Tribe, rightfully belong to the Tribe. The Tribe will not be penalized for the government's failure for approximately 50 years to promptly seek quiet title to the trust lands. This result is an equitable balance between the Tribe's right to rents from the trust lands and the government's duty to pay for improvements made prior to June 5, 1975. Accordingly the court will amend its judgment with respect to the court registry fund.

The Tribe also objects to the court ordered audit being conducted by the Inspector General of the Department of the Interior. The court cannot order payment of amounts in the Clerk's registry fund until it determines, first, that all net profits have been deposited, and second, the amounts which will compensate defendants for the loss of the use of their land since June 5, 1975. The Inspector General's proposed audit will adequately determine the first aspect. However, no proposal has been made to determine the amount which will compensate defendants. The Tribe and the private defendants shall confer and submit a proposed method (or methods) of dividing the fund.

It is therefore

ORDERED

1. The Tribe's attorney, William H. Veeder, shall pay the following amounts to the listed parties:

Iowa	$ 325.00
RGP, Inc. and Otis Peterson	$ 360.00
Wilson, Lakin and Jackson	$ 749.70
United States	$1,875.00

2. The Tribe and its attorney, William H. Veeder, shall pay the following amounts to the listed parties:

Iowa	$212.50
Wilson, Lakin and Jackson	$251.00

3. The Tribe shall pay the following amounts to the listed parties:

Iowa	$21,366.08
Wilson, Lakin and Jackson	$ 6,556.33
RGP, Inc.	$ 2,598.34

4. Motion for new trial denied.

5. The court's judgment, filed May 29, 1987, shall be amended by deleting the second paragraph of number 8 on pages 13 and 14.

6. By not later than July 20, 1987, the Tribe and the private defendants shall confer and file a proposed method (or methods) of dividing the court registry fund.

June 30, 1987.

EDWARD J. MCMANUS

Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX C

OMAHA INDIAN TRIBE, Treaty of 1854 with the United States of America (10 Stat. 1043). Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 23 U.S.C. 476) as amended, Appellant,

v.

Harold JACKSON and Otis Peterson and the District Court of Iowa in and for Monona County, Appellees.

OMAHA INDIAN TRIBE, Treaty of 1854 with the United States of America (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) as amended, Appellants,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY; Roy Tibbals Wilson Estate; Charles E. Lakin; Florence Lakin; R.G.P. Incorporated, an Iowa Corporation; Harold Jackson; Otis Peterson; Travelers Insurance Company; Darrell L. Harold; and Luea Sorenson; State of Iowa and State Conservation Commission of the State of Iowa, Appellees.

UNITED STATES of America,
Appellant,

v.

John R. WILSON, Charles G. Lakin, Florence Lakin, R.G.P. Incorporated, an Iowa Corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company and the State of Iowa, Appellees.

Nos. 87-2042, 87-2191.

United States Court of Appeals,
Eighth Circuit

Submitted April 14, 1988.

Decided Aug. 12, 1988.

William H. Veeder and Laura Frossard, Washington, D.C., for appellant.

John P. Sarcone, Asst. Atty. Gen., Des Moines, Iowa and Donald J. Buresh, Omaha, Neb., for appellees.

Before LAY, Chief Judge, FAGG, Circuit Judge, and DOTY,*District Judge.

LAY,Chief Judge.

This appeal involves the question of ownership in approximately 700 acres of land[1] formerly within the boundary of the Omaha Indian Reservation. Title to the total acreage is claimed by the Omaha Indian Tribe and is disputed in part by the State of Iowa and in part by individual non-Indian defendants. The overall area involved consists of approximately 2900 acres of land contiguous to the Missouri River on the interstate boundary between Nebraska and Iowa within an area known as the Barrett Survey. This litigation has a long history which need not be repeated here.[2]

This particular appeal arises from the remand by this court to the district court in *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1281, 79 L.Ed2d 684 (1984) (herein after referred to as *Omaha III*). On remand, the district court found that the Tribe failed to carry its burden of proof that the past movements of the Missouri River between 1879 and 1923 were due to avulsion and therefore failed to establish title as to the

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* THE HONORABLE DAVID S. DOTY, United States District Judge for the District of Minnesota, sitting by designation.

[1] The specific tracts of land and the acreage involved are set forth in the district court decree of May 29, 1987.

[2] The extensive and detailed facts are more fully set forth in the previous opinions in this on-going dispute. *See United States v. Wilson*, 578 F.Supp. 1191 (N.D.Iowa 1984); *United States v. Wilson*, 707 F.2d 304 (8th Cir.1982), *cert. denied*, 465 U.S.1025, 104 S.Ct. 1281, 79 LEd.2d 684 (1984); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir.), *cert. denied*, 449 U.S. 825, 101 S.Ct. 87, 66 L.Ed 28 (1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); *Omaha Indian Tribe v. Wilson*, 375 F.2d 620 (8th Cir.1978), *vacated and remanded*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); and *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977).

land claimed by the State and fee patented to the private landowners. The district court therefore entered judgment quieting title in the land claimed by the State of Iowa and the land claimed by the fee patented private landowners. In doing so, the district court denied ownership to the Tribe as to any of these lands. *See United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984).

The district court also entered judgment against the United States in the amount of $1,921,177.85 for the net value of the improvements that the private defendant landowners and their predecessors had made to the land.[3] This was in accord with our prior decision in *Omaha III* in which we held that the doctrine of sovereign immunity did not bar the private landowners' suit against the government for the value of the improvements. 707 F.2d at 312. In so holding, we ruled that sovereign immunity was inapplicable "[b]ecause the duty to pay for the value of the improvements is an element of the government's own claim • • • "*Id.* The district court likewise awarded prejudgment interest accruing from July 5, 1975, the day the government was placed in possession of the disputed area as trustee for the Tribe. The district court also ruled that the court registry fund which had been accumulated by the Tribe since 1975 from the net profits realized from the land could not be used by the government to satisfy its obligation to pay for the improvements.

The Tribe appeals the district court's findings as they relate to the fee patented land quieted in the private landowners and the land awarded to the State of Iowa. In doing so, the Tribe maintains that the district court failed to make sufficient findings as required by Fed.R.Civ.P. 52(a). The government appeals the award of prejudgment interest and also seeks to reverse the district court judgment that the court registry fund cannot be used to pay for the value of the improvements made upon the land. Finally, the private defendants claiming non-fee patented reservation land held in trust by the government maintain that 25 U.S.C. § 194

[3] The parties stipulated that the net value of the improvements was $1,921,177.85.

violates the due process clause of the fifth amendment. We affirm in part and reverse in part.[4]

1. Discussion

A. Tribe's Appeal

1. *Omaha III*, Mandate

In *Omaha III*, this court held that the Tribe had the burden of proof as to the land claimed by the State of Iowa and the fee patented owners. In doing so, we stated that

> Both the State of Iowa and the individual owners contend that the Tribe, to meet its burden of proof regarding the tracts of land now in controversy, must prove that the river moved westward over the eastern

[4] In this appeal, the Tribe also maintains (1) that the Department of Justice attorneys engaged in fraud and collusion in their representation of the United States as trustee for the Tribe, and (2) that 25 U.S.C. § 194 applies to the fee patented private defendant landowners. We find these claims to be without merit.

The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976. However, the Tribe failed to again raise the issue until 1985 even though the case had been reviewed once by the Supreme Court and three times by this court. At that time, the district court held that the Tribe's motion to disqualify the government attorneys was "clearly untimely and merits no serious attention or consideration". The Tribe subsequently petitioned this court for a writ of mandamus alleging the same charges. This court not only dismissed the Tribe's petition as "frivolous and totally without merit" but also awarded the United States costs and attorney's fees as sanctions against counsel for the Tribe for filing "a totally frivolous pleading." *In Re: Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus.) In view of the foregoing, this court unequivocally determined prior to oral argument that it would not entertain this meritless issue.

We also reject the Tribe's challenge to our decision in *Omaha III* interpreting 25 U.S.C. § 194 to require the Tribe to prove the avulsion necessary to establish its title to the eastern portion of the Barrett Survey as a first step in claiming the fee patented land. This court's *Omaha III* decision with respect to this issue is the law of the case, and the Tribe has provided no basis which either compels or justifies our reconsideration. *see Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981) ("prior decisions of legal issues should be followed unless there is substantially different evidence at a subsequent trial or new controlling authority, or the prior decision was clearly erroneous and would result in injury.") (citations omitted).

> Barrett Survey land between 1867 and 1923 by avulsion; In other words, they argue the Tribe must establish affirmatively how the river moved during the entire period of time relevant to this lawsuit. As indicated we agree.

Omaha III, 707 F.2d at 310. In remandate to the district court, we specifically stated

> We therefore remand this case to allow the district court to determine whether the Tribe has met its burden of proof defined herein. If it holds that the Tribe failed to meet its burden, it must then determine whether the private defendants and the State of Iowa are entitled to have title to the tracts of land in controversy quieted in them.

Id. (footnote omitted).

We believe that the district court promptly implemented this directive and correctly interpreted the Tribe's burden. On demand, the district court stated:

> Basically the Court of Appeals ordered the Tribe to return to the beginning. The Tribe must prove on the merits its entitlement to the eastern Barrett Survey land before this Court's holding that the western lands were accretions would have any legal significance. This, of course, demands that the Tribe show them from 1879 to 1923 the original boundary of the reservation remained unchanged because all river movements in that time period were avulsive.

578 F.Supp. at 1195 (footnotes omitted).

On remand, the district court required the parties to submit post appeal findings of fact and conclusions of law. Based upon its subsequent evaluation, the district court stated that it would not alter its view of the evidence which had been exhaustively reviewed in prior decisions and concluded that the Tribe could not sustain its burden of proving the necessary avulsions. *Id.* at 1193. In view of our prior holdings that it was equivocal whether all relevant movements of the Missouri River were through accretion only, 575 F.2d at 648;

614 F.2d at 1160-61; and our belief that because of the passage of time involved, the party having the burden of proof inevitably may face insuperable barriers, 707 F.2d at 311, we conclude that the district court's findings are not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76, 106 S. Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

On remand, the district court also determined, as required by this court, that the State of Iowa and private defendants were entitled to have title quieted in them to the state and fee patented lands respectively. 578 F.Supp. at 1196. Both the private landowners and the State produced record titles. In doing so, the district court therefore concluded that the State and private defendants had presented sufficient evidence to obtain quiet title decrees against the Tribe. *Id.* We determine that this holding is also not clearly erroneous. Based upon the foregoing, we therefore conclude that the district court complied with the mandate of *Omaha III* by reviewing the record in light of the burden of proof placed upon the Tribe, and affirm the district court's finding that the Tribe did not sustain its burden of proving that the Missouri River's movements were avulsive with respect to the non-trust lands within the Barrett Survey area.

2. Fed.R.Civ.P. 52(a)

We also reject the Tribe's claim that the district court failed to make sufficient findings as required by Fed.R.Civ.P. 52(a). Although rule 52(a) provides in relevant part that "[i]n all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon * * *", this court has previously stated that "findings of a district court 'are adequate if they afford a reviewing court a clear understanding of the basis of the trial court's decision.'" *Lynch Corp. v. MII Liquidating Co.*, 717 F.2d 1184, 1187 (8th Cir.1983) (citation omitted); *see also Christensen v. Great Plains Gas Co.*, 418 F.2d 995, 1000 (8th Cir.1969) ("findings of fact should be with such specificity [so] as to afford a reviewing court a clear understanding of the ground for the trial court's decision * * *.")

(citations omitted); *Falcon Equipment Corp. v. Courtesy Lincoln Mercury*, 536 F.2d 806, 808 (8th Cir.1976); *United States v. F.D. Rich*, 439 F.2d 895, 899 (8th Cir.1971).

The adequacy of the district court's findings in the instant case must be viewed against the extensive prior scrutiny of the evidence in this case not only by the district court on two occasions, but also by this court on three separate occasions and by the United States Supreme Court. This was the third time the district court had considered the evidence and rather than recatalogue the evidence a third time, the court referred to the prior decisions in this case for a full statement of the extensive evidence.

The Tribe faults the district court's findings on the basis that the district court reasserts that the relevant movement of the Missouri River was through accretion rather than avulsion. The Tribe argues that this court in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir.1978) (hereinafter referred to as *Omaha I*), held that these findings were speculative and not supported by substantial evidence. To the extent that the Tribe recites the historical record, its appraisal of the record is an accurate one. Although the district court in the remand of the present case states that it will not alter its view of the evidence, 578 F.Supp. at 1193, the district court nevertheless acknowledges that: "the Court of Appeals has foreclosed that view becoming the foundation of a decision. As a result of this Court's view and the Court of Appeals mandates, no party can meet its burden of proving accretion or avulsion." *Id.* It is clear from the district court's opinion that the court in review of the overall evidence found that the Tribe failed to sustain its burden of proving that the Missouri River's movements were avulsive. Our analysis of the record is such that we must agree. In doing so, we again reject the district court's earlier findings relating to the trust lands and reaffirm our earlier judgment that those findings are based soley upon speculative and equivocal evidence. We agree, however, with the district court that the historical evidence demonstrates the same speculative foundation to sustain the Tribe's assertion that the river's movements were avulsive. We therefore conclude that the district court find-

ings are sufficient for purposes of rule 52(a), are not clearly erroneous, and must be sustained.[5]

B. Government's Appeal

In its cross-appeal, the government maintains that the district court erred both in determining that the government could not use the escrowed profits realized by the non-Indian lessees of the Barrett Survey land to satisfy its obligation of paying for the improvements on the land, and, in awarding prejudgment interest on the value of the improvements.

1. Court Registry Fund

It is fundamental law that a trustee is entitled to reimbursement from the trust estate for expenses incurred which are beneficial to the trust beneficiary and not solely the trustee

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[5] In this appeal, the Tribe also maintains that the district court erred in not quieting title in favor of the Tribe as to the entire 6390 acres comprising Blackbird Bend, and, that it is not bound by the district court judgment quieting title to land within the Barrett Survey. Because this court's *Omaha III* mandate directed the district court to act only as to the State and fee patented lands *within* the Barrett Survey, we reject the Tribe's claims.

The Tribe's arguments patently ignore the fact that the scope of this litigation was clearly defined at its initial statges over 12 years ago. In 1976, the district court granted the *Tribe's* motion to consolidate for trial its own action in ejectment seeking land outside the Barrett Survey area and the government's equitable quiet title proceeding concerning the 2900 acres of land within the Barrett Survey area as trustee for the Tribe. The district court, moreover, subsequently severed the Tribe's claim to lands outside the Barrett Survey. The Tribe did not object to the district court's severance order either by motion for reconsideration, request for interlocutory relief, or in any of the subsequent appeals. Rather, the Tribe proceeded to trial in this quiet title action involving only the 2900 acres of land within the Barrett Survey. This has clearly been the subject matter throughout this entire litigation. Both the district court and this court have repeatedly recognized this fact. *See* 433 F.Supp. at 67-69, 74-75 575 F.2d at 622, 623 n. 4, 651 n. 69; 523 F.Supp. at 902-03; 707 F.2d at 306-07, 310; 578 F.Supp. at 1192. Thus, the only matter properly before this court is whether the district court complied with this court's *Omaha III* mandate directing the district court to act only as to the State and fee patented lands within the Barrett Survey. *See Adamain v. Lombardi*, 608 F.2d 1224, 1228 (9th Cir.1979) (scope of review is limited to what the remamd order required); *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940) ("After case has been brought to this court and decided and a mandate has been issued to the court below, a second appeal brings up nothing for revision but the proceedings subsequent to the mandate * * *.").

unless the expenses were incurred because of the personal fault or error of the trustee. *See* G.G. Boger and G.T. Bogert, *The Law of Trusts and Trustee §§* 801, 809 (2nd Ed. 1981); *see also, duPont v. S. Nat'l Bank of Houston, Tex.* 771 F.2d 874 (5th Cir. 1985); *Morrissey v. Segal*, 526 F.2d 121 (2nd Cir.1975) *Warrick v. Comm'r of Internal Revenue* 173 F.2d 905 (8th Cir. 1949). In the instant case, the government is obligated by the judgment quieting title to pay for the substantial improvements on the land which under the judgment, plainly accrue to the benefit of the beneficiary of the trust-the Omaha Indian Tribe. Because the judgement quieting title to the land in the United States in trust for the Tribe clearly benefits the Tribe, we therefore conclude that the liability imposed upon the government to reimburse the private landowners for the improvements as a condition precedent of the quiet title decree should be satisfied out of escrowed trust funds in the court registry fund.

In determining that the government can use the escrowed profits to satisfy its obligation of paying for the improvements on the land, we reject the district court's conclusion that the government was at fault for failing to seek quiet title to the trust lands for approximately fifty years. As indicated by the United States, there has been no showing that the government deliberately avoided instituting the quiet title action or was otherwise in bad faith, or that the Omaha Indian Tribe suffered in any way as a result of any alleged delay. Rather, the Tribe has obtained the substantial benefit of having the land within the Barrett Survey cleared, drained, and otherwise improved through the efforts of the non-Indian defendants.

2. Prejudgment Interest

As indicated, the government also argues in its cross-appeal that the district court erred in awarding prejudgment interest on the value of the improvements. In doing so, the government relies upon 28 U.S.C. § 2516(a) (1982) which provides that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof." *See also United States v.*

Sioux Nation of Indians, 448 U.S. 371,887 n. 17, 100 S.Ct. 2716, 2727 n. 17, 65 L.Ed.2d 844 (1980). The government claims that because there is no contractual or congressionally expressed statutory provision, it is not liable for prejudgment interest in the instant case. We disagree. In doing so, although we acknowledge that section 2516(a) codifies the traditional rule that the government does not pay prejudgment interest, we conclude that the traditional rule does not apply under the circumstances of this case.

The traditional rule codified in section 2516(a) issues from and is another attribute enjoyed by the United States under its sovereign immunity. However, as we recognized in *Omaha III*, the government's obligation to pay for the improvements made upon the land is not based upon the defendants' counterclaims, but rather, is an element of the government's own claim. 707 F.2d at 312. The equitable nature of the improvements claim, moreover, is distinctive from the types of claims in which section 2516(a) traditionally applies. As we earlier noted, the government seeks the intervention of equity to quiet title, and must do equity to obtain such equitable relief. *Id.* We therefore conclude that the principles of equity apply and the traditional rule embodied in section 2516(a) does not apply to the government's claim that it is not liable for prejudgment interest.

We believe, moreover, that the government's argument is both inconsistent and irreconcilable with the conclusion we reached in *Omaha III* that the government was not protected by sovereign immunity from reimbursing the defendants for the improvements they made upon the land. It would be incongruous to hold, as we did in *Omaha III*, that the government is not shielded by the doctrine of sovereign immunity from its obligation to pay the defendants for the improvements, and now conclude that the government is shielded by sovereign immunity from paying prejudgment interest on the net value of those same improvements. The defendants are entitled not only to the net value of the improvements they and their predecessors made to the land, but the full equivalent value of the improvements. This will be obtained only if the defendants are reimbursed for the net

value of the improvements together with interest from June 5, 1975, the date when the United States and the Omaha Indian Tribe were placed in possession. We therefore conclude that the district court acted within its traditional equity powers, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14, 102 S.Ct. 1798, 1803-04, 72 L.Ed2d 91 (1982), and in a manner entirely consistent with *Omaha III* in determining that prejudgment interest should be awarded.

C. Private Defendants' Appeal

Finally, the private defendants claiming non-fee patented reservation land held in trust by the government maintain that 25 U.S.C. § 194 effects an invidious discrimination on the basis of race contrary to the due process clause of the fifth amendment. We cannot agree. This court's decision in *Omaha I* with respect to this issue is the law of the case, and the private defendants have provided no basis which either compels or justifies this court's reconsideration. *See* 575 F.2d at 631 n. 18; *see also Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir.1981) (citing *Kimball v. Callahan*, 590 F.2d 768, 772 (9th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *White v. Murtha*, 377 F.2d 428 (5th Cir.1967).

II. Conclusion

The judgment of the district court denying the government's claim that it be allowed to use the court registry fund to satisfy its obligation to pay for the value of the improvements made upon the land is reversed. The remainder of the district court's judgment is affirmed.[6]

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[6] Our judgment in this appeal has no bearing whatsoever on the Tribe's claim to any land outside the boundary of the original reservation which is defined by the Barrett Survey. The judgment in the instant case neither prevents the Omaha Indian Tribe from prosecuting nor disposes of the Tribe's pending action to recover accretions to tribal lands against those defendants who now occupy land within the Blackbird Bend area but outside the boundary of the Barrett Survey area or to damages for trespass to those lands. However, the Tribe's pending claims to the remainder of the Blackbird Bend area is an action at law for ejectment in which the defendants might be entitled to a jury trial as opposed to the instant equitable quiet title proceeding. The Tribe's arguments also ignore the differing burdens of proof that apply to land within the Barrett Survey area and those lands that are outside the Barrett Survey. This court in *Omaha I* and the Supreme Court in *Wilson* agreed that the imposition of the burden of proof upon the private defendants and the presumption of title in the Omaha Indian Tribe triggered the application of 25 U.S.C. § 194 because the area of land within and defined by the Barrett Survey was indisputably at one time a part of the Omaha Indian Reservation under the Treaty of 1854. *See* Treaty of March 16, 1854, art. 1, 10 Stat. 1043. Conversely, the application of section 194 is not controlling at it affects the areas outside the original reservation which is defined by the Barrett Survey. Thus, as we previously stated: "the same proof showing presumptive title (Treaty of 1854) to the reservation cannot govern any future litigation concerning lands outside the area." 575 F.2d at 651 n. 69. *See also One Lot Emerald Cut Stones and One Ring, v. United States,* 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (findings cannot be given binding effect in proceedings or portions of proceedings where the prevailing party has a higher burden of proof). Finally, there are numerous landowners outside the Barrett Survey area who have not participated in the trial or any of the appeals dealing with the Barrett Survey. To quiet title in the Tribe to the lands outside the Barrett Survey area which were not the subject matter of the trial proceedings would improperly deny these parties their constitutionally protected rights to be heard.

We sense as well the Tribe's misapprehension as to the effect of the district court's rejection of its claim of avulsion against the State and the fee patented land in the present case. In the suit relating to lands outside the Barrett Survey other than the State land and the fee patented lands, the Tribe's claim must rest on their newly established title to the trust lands within the Barrett Survey and proof of accretion to such trust land. In pursuing these claims, the Tribe need not prove avulsive movement of the river as a basis of their title to the trust lands. Title has now been quited in the Tribe and this is now a historical and legal fact upon which they can make their claims to accreted lands. On the initial remand in *United States v. Wilson,* 523 F.Supp. 874 (N.D. Iowa 1981); the district court attempted to apply this rule to the State and fee patented lands. Our reversal was based upon the fact that this would allow the Tribe to bootstrap the section 194 presumption which was not applicable to the State or fee patented landowners. However, this principle does not govern the Tribe's claims to lands which may have accreted to the trust lands and which lie outside the Barrett Survey.

APPENDIX D

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 87-2042/2191-NI

OMAHA INDIAN TRIBE, *etc., et al.*,

Appellants,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY, *et al.*,

Appellees

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

Appellant Omaha Indian Tribe's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit

November 10, 1988

APPENDIX E

Supreme Court of the United States

No. A-572

OMAHA INDIAN TRIBE OF NEBRASKA

Petitioner,

V.

HAROLD JACKSON, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 28 February, 1989

HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States.

Dated this 18th
day of January, 1989.

William H. Veeder, Washington, D.C., John T. O'Brien, Sioux City, Iowa, for Omaha Indian Tribe.

Edson Smith, Donald Buresh, Robert J. Becker, Omaha, Neb., for Roy Tibbals Wilson.

Lyman Larsen, Thomas Burke, Omaha, Neb., for Charles G. and Florence Lakin and Harold Jackson.

John E. North, Lee Hamann, Omaha, Neb., for Charles and Florence Lakin.

Peter J. Peters, Council Bluffs, Iowa, for RGP, Inc. and Otis Peterson.

Maurice Nieland, Sioux City, Iowa, for The Travelers Ins. Co., Harold Sorenson and Harold M. Luea Sorenson and Darrell L. Sorenson.

Elizabeth M. Osenbaugh, Thomas J. Miller, John P. Sarcone, Asst. Attys. Gen., Des Moines, Iowa, for State of Iowa and Iowa State Conservation Commission.

Monona County Atty., Michael Jensen, Onawa, Iowa, for Monona County.

D. Carlton Shull, George Madsen, Sioux City, Iowa, for Agricultural & Indus. Inv. Co.

Wiley Mayne, Lowell C. Kindig and John Mayne, Sioux City, Iowa, for numerous defendants.

Phillip J. Willson, Council Bluffs, Iowa, for Northern Natural Gas Co.

Ronald E. Runge, Sioux City, Iowa, for Lloyd Fletcher.

Dewie J. Gaul, P.L. Nymann, Sioux City, Iowa, for Iowa Public Service Co.

Robert R. Eidsmoe, Sioux City, Iowa, for Mobil Pipeline.

Theodore T. Duffield, Des Moines, Iowa, for Regina Marie Torticilli.

Steven Carter, Sioux City, Iowa, for James McGuire, Auctioneer for Hudgel Estate.

Emmanuel S. Bikakis, Sioux Ctiy, Iowa, for Williams Pipeline Co. (formerly Williams Bros. Pipeline).

Clark G. Redick, Kansas Ctiy, Mo., for American Tel. & Tel. Co.

Larry Fulton, Denver, Colo., for the Fidelity National Title Ins. Co.

Ernest L. Olson, pro se.

APPENDIX F

Re: U.S.

v.

WILSON;

OMAHA INDIAN TRIBE

v.

JACKSON;

OMAHA INDIAN TRIBE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO.

Nos. C75-4024, C75-4026 and C75-4067.

United States District Court, N. D. Iowa, W.D.

Sept. 4, 1981.

MEMORANDUM OPINION

BOGUE, Chief Judge.

The Eighth Circuit Court of Appeals remanded these cases to this Court to determine the facts in light of the principles and conclusions set forth in both its second opinion, *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), and in the opinion of the United States Supreme Court. *Wilson v. Omaha Indian Tribe*, 442 U.S. 655, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). This Memorandum Opinion provides this Court's resolution of several issues of law and fact remaining in the consolidated Blackbird Bend-Barrett Survey area cases.

I. FACTUAL BACKGROUND

These cases concern the ownership of approximately 2,900 acres of land on the east bank of the Missouri River in Iowa. The parties seek to quiet title to the land, which was affected by the movement of the banks of the Missouri River over a period of nearly eighty years. The history of this land dispute and the discussion of the early movement of the Missouri River is set out in the Court's original opinion, 433 F.Supp. 67 (N.D.Iowa 1977), as well as the two opinions of the Court of Appeals. 575 F.2d 620 (8th Cir. 1978); 614 F.2d 1153. The Court of Appeals vacated this Court's original judgment and remanded the case with several directions. First, the Court entered judgment quieting title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee and the Omaha Indian Tribe. Second, the Appellate Court ordered that the Tribe's case against the State by severed, so that this Court could separately determine whether the Tribe sustained its burden of proof against the State. 614 F.2d at 1161.

Several additional issues were not resolved by any of the Appellate Court decisions in this case. One issue concerns the ownership of land within the Barrett Survey which was allotted to individual Indians and subsequently patent to non-Indians, or relinquished by the Indian allottees back to the Tribe. The Court of Appeals' second decision concerned

only trust lands and failed to respond to issues of ownership of "fee patented" lands. The Court's first decision remanded the issues of fee patented land ownership back to this Court's. 575 F.2d at 651, n. 70. This Court must further address the defendants' claim for the value of improvements placed upon land in which title was quieted in plaintiffs. Finally, this Court has before it the parties' motions for summary judgment concerning title to lands outside the Barrett Survey within the Blackbird Bend area.

To better understand the remaining issues and claims of the parties the Court refers to Exhibit T80. (Plate 1) The large dotted area represents land which has never been allotted to any member of the Omaha Tribe and has never been patented by the United States to anyone. These are trust lands claimed only by individual defendants and clearly are governed by the Court of Appeals' order to this Court to quiet title in the Tribe. The small dotted areas on Exhibit T80 represents allottees or cancelled. See also, Exhibits A through P.[1] Finally, the cross-hatched areas on Exhibit T80 are lands which have been patented in fee or otherwise left their trust status after the 1854 Treaty. The individual defendants assert a claim to the fee patented lands based upon state laws for adverse possession, statutes of limitation and laches.

The Tribe contends that both the individual defendants' claim to fee patented lands and the State of Iowa's claim to land along the western edge of the Barrett Survey, are defeated by the evidence establishing that all of the land in the western Barrett Survey was eroded and replaced by accretions to tribal trust land. The prior decisions in this case place upon the Tribe the burden of proving its case against the State by a clear preponderance of the evidence. 99 S.Ct. at 2543; 614 F.2d at 1161. This Court must address first the State's argument concerning the scope of the Tribe' burden of proof.

[1] Exhibits A through P are the letters of various allottees or their heris requesting that their original allotments within the Omaha Indian Reservation be exchanged for new allotments. Because of the encroiachment of the Missouri River.the orginal allotments had become unsuitable for farming. (Corke-86:12-88:12).

II. THE TRIBE'S BURDEN OF PROOF AGAINST THE STATE OF IOWA

The Tribe asserted title to trust land in the eastern portion of the Barrett meander lobe based on a series of river avulsions between 1867 and 1923, which left these original reservation lands in place. 433 F.Supp. at 70-71. After reaching its 1923 position,[2] however, the Tribe asserted the River moved easterly, eroding the western portion of the Barrett Survey up to a line running north to south through the western edge of Nebraska Sections 13 and 24,[3] From this line eastward in the Barrett Survey, the Tribe alleged its lands left in place by pre-1923 river avulsions were not later obliterated. From this line, to the west in the Barrett Survey up to the 1943 Iowa Nebraska Compact line, the following specific River movements were asserted: (1) From 1923 to 1930, the River eroded all of the Barrett Survey lands lying west of the "not obliterated" line, as the River move eastward; (2) From 1930 to 1943, the River receded westward to its present location, replacing all of the western Barrett Survey lands with accretions and relictions. These accretions attached to tribal lands in place in the Barrett Survey east of the "not obliterated" line. See, Tribe's Post-Trial Proposed Findings of Fact, No. 58; (1446:9-1447:24).

The Tribe owns the trust lands east of the "not obliterated" line by virtue of the Court of Appeals' decision which held that the individual defendants failed to prove their superior title thereto based on pre-1923 river movements. 575 F.2d at 650, 651; 614 F.2d at 1161. The land claimed by the State of Iowa is located along the Compact line in the western portion of the Barrett Survey. See, State's Proposed Findings on Remand, No. 41. Consistent with its original theory, therefore, the Tribe asserts title to these lands as accretions created after 1923, which attached to eastern tribal lands.

The State of Iowa, however, contends that the Tribe must affirmatively prove pre-1923 river avulsions as well as

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[2] Exhibit T105. (Plate 2)

[3] See, Exhibit T80; (Abrahamson—1425:7-19)

movement by accretion thereafter.[4] The State asserts it is not bound by the Court of Appeals' decision quieting tribal title to the eastern Barrett Survey lands, since that decision was based upon the failure of other defendants to meet their burden of proof under 25 U.S.C. §194. That decision "does not establish, in this proceeding in which the [Tribe has] the burden of persuasion, that the river moved to its 1879 and 1923 positions by avulsion...." State's Proposed Conclusions on Remand, No. 10. Given the reallocation of the burden of proof on remand, the State contends there is a "nonidentity of issues." In support of its conclusion that the Tribe must prove pre-1923 avulsions over eastern Barrett Survey lands, the State cites *Young & Co. v. Shea*, 397 F.2d 185, 188-189 (5th Cir. 1968); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 235 (2.d.Okl.1974); *Finnerman V. McCormick*, 499 F.2d 22, 214 (10th Cir. 197); *Shimman v. Frank*, 625 F.2d 80, 89 (6th Cir. 1980). These cases stand for the rule that a judgment obtained in a prior, distinct proceeding will not resolve common issues of fact in a subsequent case between the same parties, in which the burden of persuasion differs. See also, Rest.2d Judgments, § 68.1(d).

Admittedly, this is not a proper case for the invocation of the doctrines of res judicata and collateral estoppel. *Res judicata* requires a showing that there has been a previous action between the same parties involving the same subject matter, in which a final judgment has been rendered with respect to the same cause of action. *Parklane Hosiery Co., Inc. V. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Bryson V. Guarantee Reserve Life Ins. Co.*, 520 F.2d 563 (8th Cir.1975). Clearly, the Tribe does not invoke a judgment obtained in a prior, distinct proceeding. The judgment quieting tribal title in eastern Barrett Survey trust

[4] This Court is puzzled by the Court of Appeals' statement that the Tribe should "point out specific evidence relied upon to show avulsion on the particular land claimed by the State." 614 F.2d at 1161. A cursory reading of either the Tribe's Post Trial Proposed Findings or the Record the Tribe developed at trial would have revealed that its claim against the State did not rely upon proof of pre-1923 avulsions. This Court does not, therefore, deem that statement controlling on remand.

lands was entered on appeal in this action, and it concerned the title to property distinct from the land the State claims.

Further, collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in a future lawsuit. *Harris V. Washington*, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); *Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979). The issue of ultimate fact determined by the Court of Appeals was title to trust lands claimed by other individual defendants. Title to that land is no longer in issue. This case, on remand, does not concern the power of the Court to decide issues already determined by a prior, distinct proceeding. Neither collateral estoppel, therefore, nor any exception to the doctrine based on reallocations of burden of proof, apply to this stage of the proceeding.

Nonetheless, the State cannot require the Tribe to prove river movements over eastern trust lands the State does not claim, the title to which was quieted in the Tribe against other defendants. The decision of the Court of Appeals did not resolve an issue of fact common to the issues now before this Court. The fact that the burden of proof differed concerning other land and other parties is of no consequence to the Tribe's claim against the State.

It does not matter that the Court of Appeals did not finally determine the nature of the pre-1923 river movements over eastern trust lands. That issue is no longer relevant. The State does not claim title to any eastern trust lands affected by the pre-1923 river and governed by the Court of Appeals' mandate. Proof of pre-1923 river changes is not essential to the Tribe's claim against the State. The decision of the Court of Appeals quieting tribal title to land lying east of the State's claims, therefore, constitutes the law of this case.

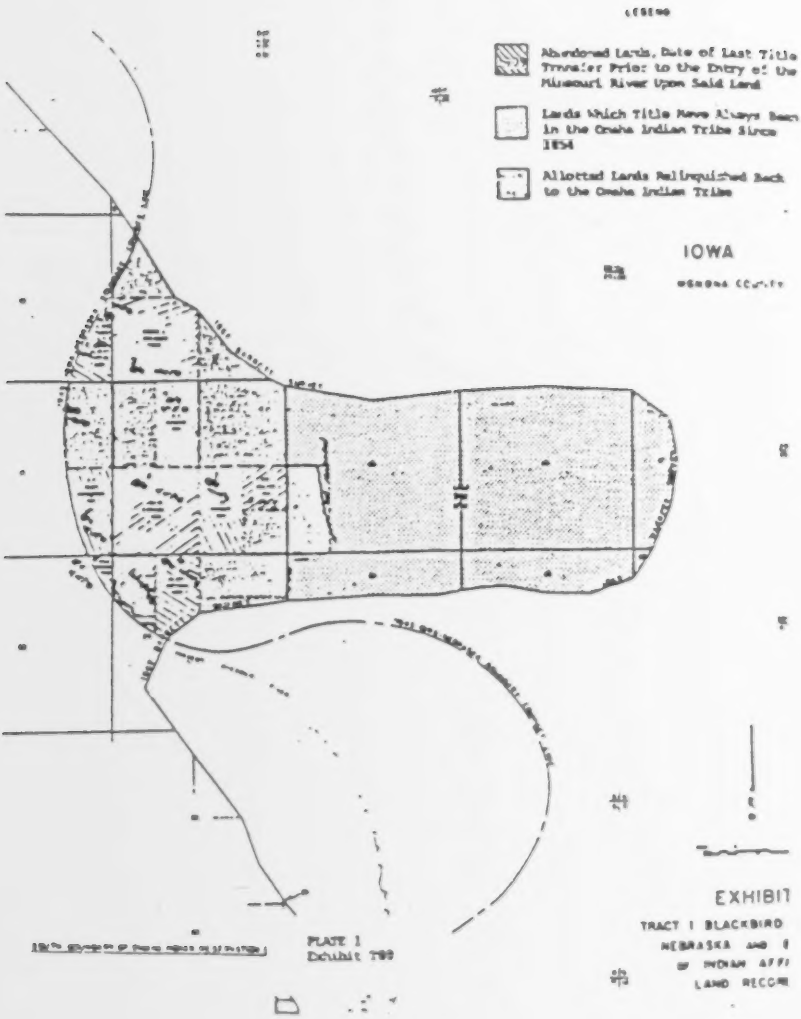
The Eighth Circuit Court of Appeals has repeatedly stated:

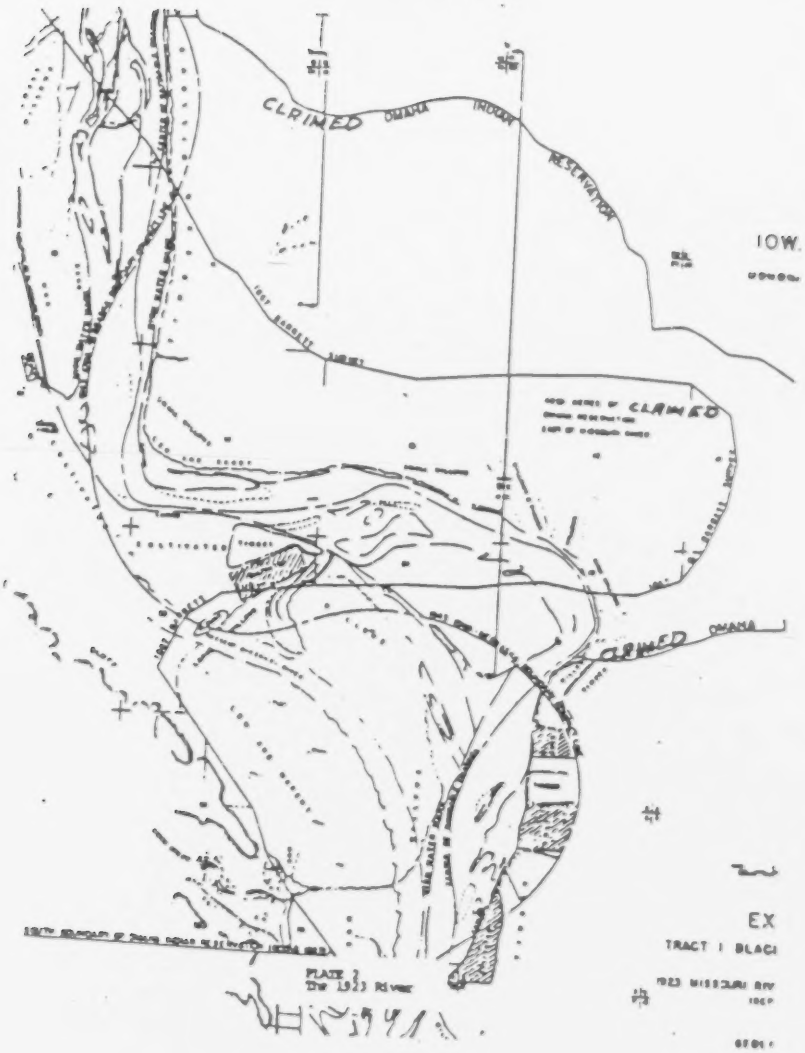
> When a case has been decided by this court on appeal and remanded to the District Court, every question

> which was before this Court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate... That Court is without power to do anything which is contrary to either the letter or spirit of the mandate... *Thornton v. Carter*, 109 F.2d 316, 319-320 (8th Cir. 1940); *Houghton V. McDonnell Douglas Corp.*, 627 F.2d 858, 865 (8th Cir. 1980); *Psull V. Archer-Daniels-Midland Co.*, 313 F.2d 612 (8th Cir. 1963).

To require the Tribe to reassert its evidence of river movements over land which it owns under the Court of Appeals mandate would be contrary to the decree this Court is bound to execute upon remand of this action.

Accordingly, the evidence which is relevant to the Tribe's claim against the State is that which concerns the movement of the river, from 1923-1943, over the land the State claims.


Abandoned Lands, Date of Last Title Transfer Prior to the Entry of the Missouri River Upon Said Land
Lands Which Title Have Always Been in the Omaha Indian Tribe Since 1854
Allotted Lands Relinquished Back to the Omaha Indian Tribe
IOWA
PLATE 1
Exhibit T99
EXHIBIT
TRACT I BLACKBIRD
NEBRASKA AND
OF INDIAN AFFI
LAND RECOR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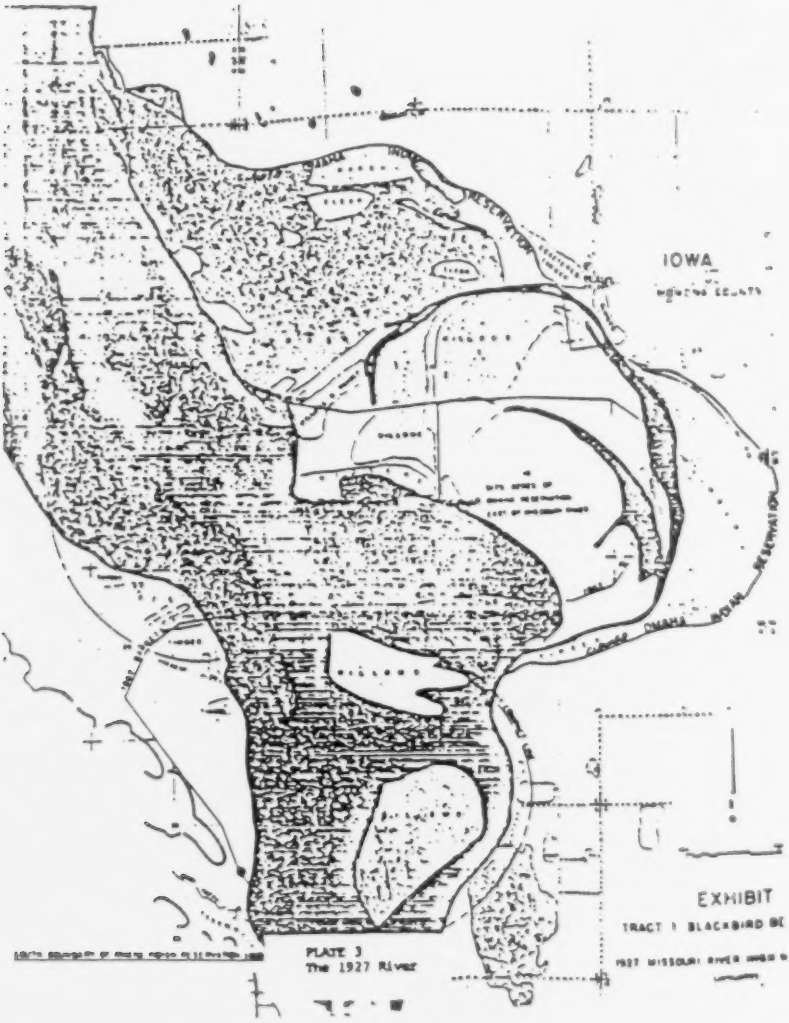
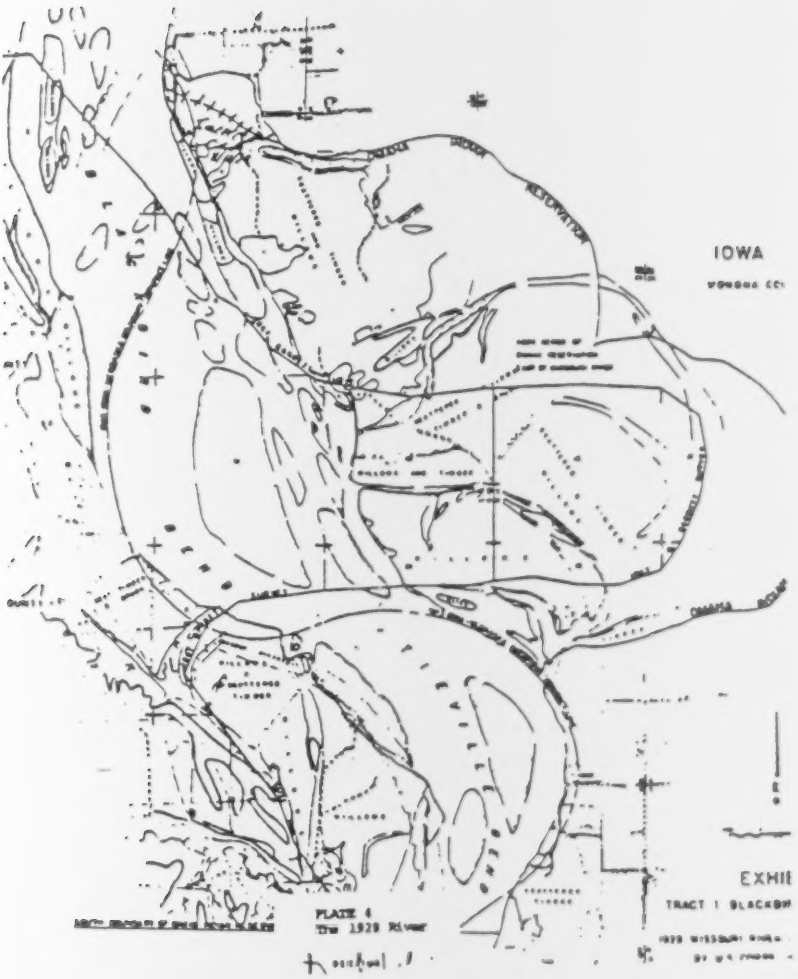

IOWA
EXHIBIT
PLATE 3
The 1927 River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TRACT 1 BLACKBIR
PLATE 4

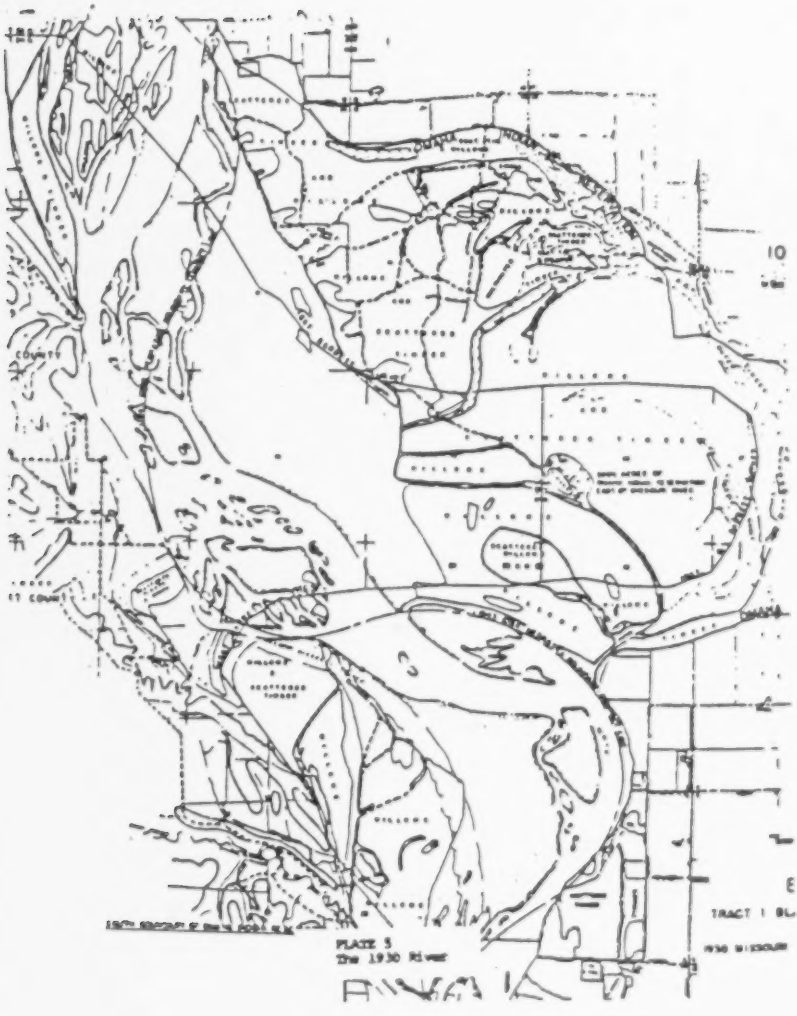
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PLATE 5
The 1930 River

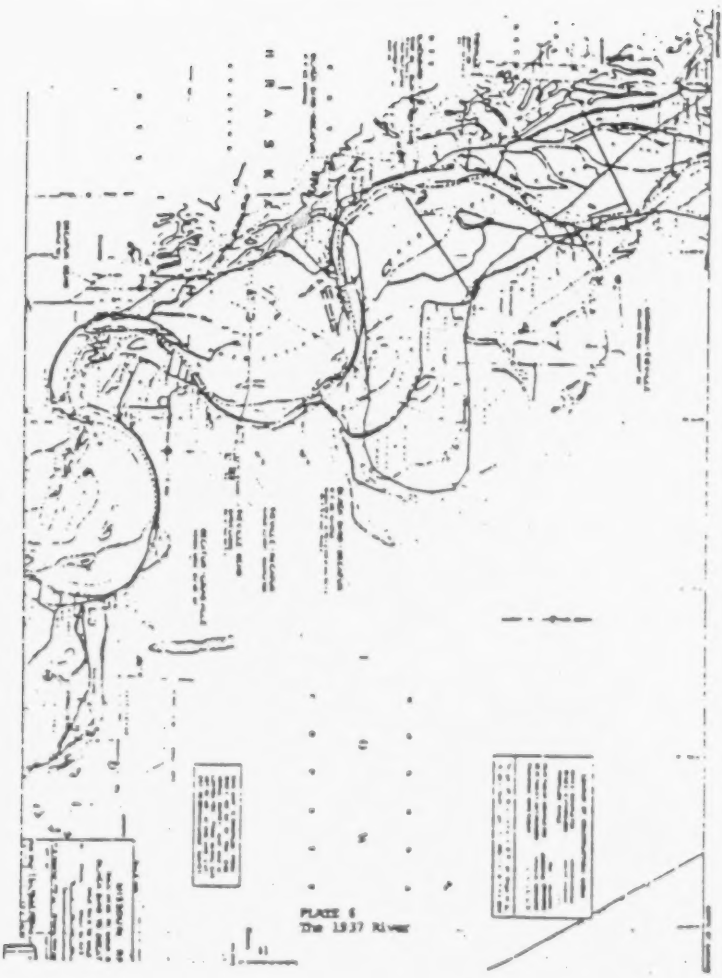
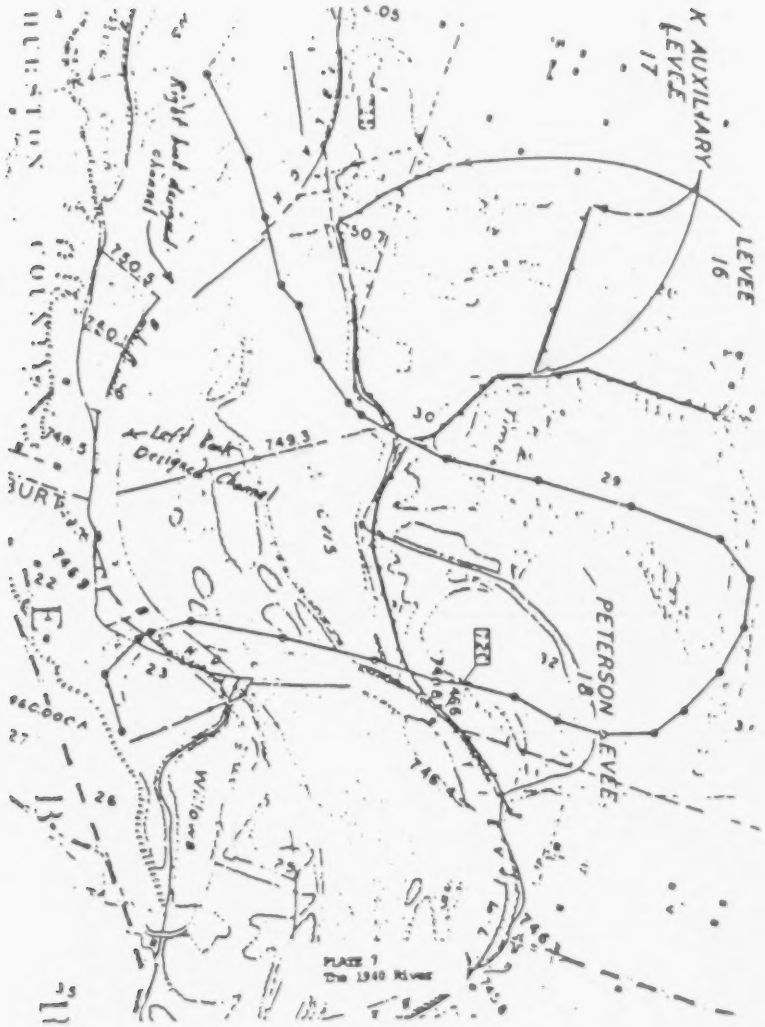
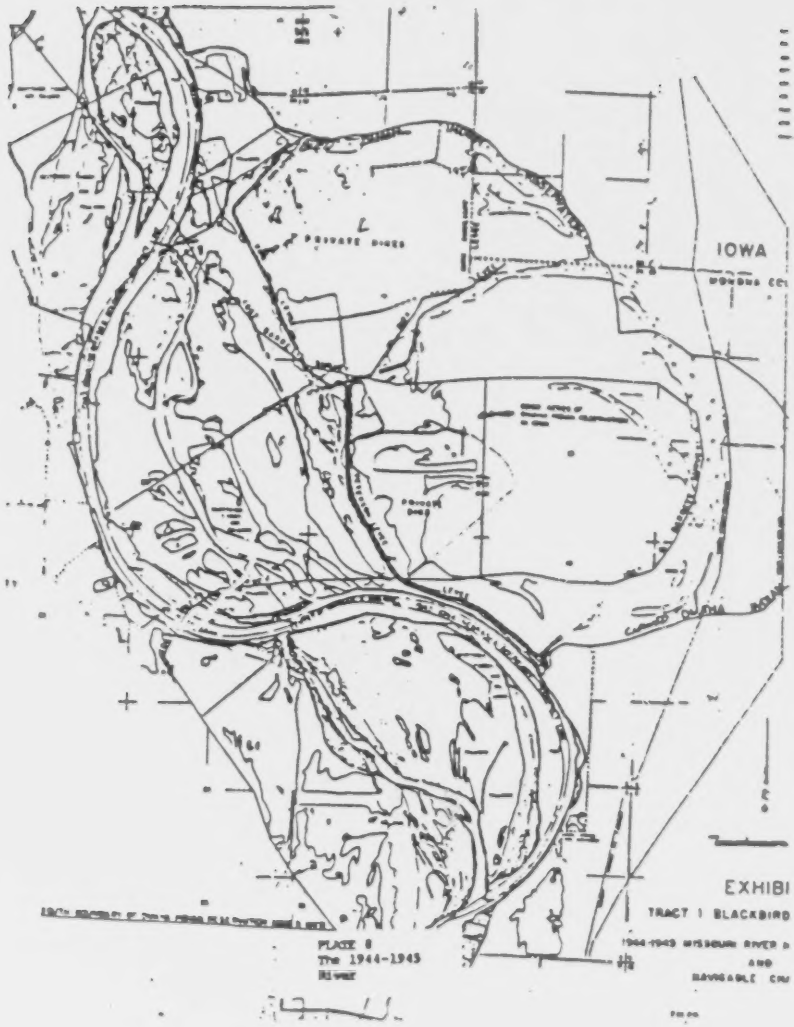


PLATE 6
The 1937 River


AUXILIARY LEVEE
LEVEE
PETERSON LEVEE
Left Bank Original Channel
Right Bank Original Channel
WILLOWS
PLATE 7
The 1940 River


IOWA
EXHIBI
TRACT I BLACKBIRD
PLATE 8
The 1944-1945
River

III. THE MISSOURI RIVER BETWEEN 1923-1943

A. U.S. Corps of Engineers maps and aerial photographs trace the location of the river during this period. In 1923, (Exhibits W-04; T-35; T-105, composite), the river flowed north to south through Nebraska Sections 10, 11, 14 and 15. (341:8) When it reached the southeast corner of Section 15, the river made a 90 degree angle turn to the east, traversing the southern portion of Sections 14, 13 and 18. The river then turned south at left the Barrett Survey area. The land on the east bank, in Sections 11, 14, 13 and 18, was supporting some vegetation, consisting primarily of small willows.

After 1923, the river became "braided." (1073:12-14) That is, the river flowed in a wide riverbed, with many channels. (1101:23-25) From 1923 to 1927 (Plate 3), the left bank of the river migrated a mile to the east, into Sections 13 and 24. (2084:12) (Exhibits W-54, T-36, T-106, composite) In 1928, the riverbed extended from the western half of Section 15, across Section 14, to the west half of Sections 13 and 24. (Exhibit T-107) The maps, photographs, and expert testimony indicate that the left bank in Sections 13 and 24 consisted of fast, stable land supporting willows and other vegetation. (Robinson 1075:13-16; 1078:10-16;); (Exhibit T-107, composite); (Clark-358). The 1928 left bank marks the farthest eastern progression of the river in the Barrett Survey during this period. (Plate 4)

After 1928, the river migrated westward away from the 1928 eastern high bank. In 1930, the left bank of the river ran in a southeasterly direction across Sections 10 and 14. A large, continuous sand bar developed between the fast, stable land in Section 13 and the receding left bank. (Huber 2086:12-16) The location of the river in 1930 is indicated by Exhibits T-41, V-4, T-108 and Iowa H-8. (Plate 5) Through 1932, the river continued to recede westward. (1085:17-20); Exhibit 109; (1098:23-25)

In 1936, the Corps of Engineers began construction of structures in the Blackbird Bend area designed to train the river into a fixed alignment. 433 F.Supp. at 86 (2092:10) The projects consisted of dikes and an abatis. Several private

individuals[5] also constructed levees across the Barrett Survey lands. The Corps constructed dike 749.3, in a southwesterly direction across Sections 14 and 15. Exhibit, Wilson D-5. Additionally, a private structure (the Peterson levee) was built north to south across the western half of Section 13. This levee coincides with the farthest eastern progression of the river after 1923. Exhibit, Wilson I-5. Another private structure (Kirk levee) and an abatis built in the northwest corner of Section 13 also affected the course of the river across the western Barrett Survey.

The maps and photographs of the river in 1937 (Exhibit B-5), 1939 (Exhibit D-5) and 1940 (Exhibits F-5 and G-5) show the progressive westward movement of the main channel until it reached the 1940 designed channel. (Plates 6 and 7) The river receded substantially from Sections 11, 14 and 23 by 1937. In 1939, there was fast, stable land in Section 11 and in the eastern half of Section 14, supporting willows and other vegetation. By 1940-1941, the river was largely confined to a single channel which corresponded approximately to the 1943 Iowa-Nebraska Boundary Compact line. Exhibits I-8 and Wilson G-5. Intermittent channels crossed sand bars on the left bank in Sections 10, 11, 15,22, 23 and the western edge of Section 14. These sand bars showed characteristics or permanence, including vegetation.

Having established the location of the river during this period, this Court will review the testimony concerning the nature of the river movements.

B. The Tribe asserts all of the land west of Sections 13 and 24 in the Barrett Survey formed as accretions to eastern tribal lands. The Tribe relies upon the testimony of its own expert witnesses, Doyle Abrahamson (surveyor), Dr. Charles Robinson (geologist), and Elmer Clark (surveyor).

1. Mr. Abrahamson testified specifically concerning the location and obliteration of the "fee patented" lands in the western Barrett Survey. Exhibit T-80 (1416:1, *et seq.*) As the river moved eastward after 1923, land in the western

[5] Defendant's predecessors in interest, Kirk and Peterson.

Barrett Survey eroded away. "Fee patented" lands in Sections 10, 11, 14 and 15 were destroyed shortly after 1923. (1417-1419). Other fee land in Section 14 eroded away by 1927. (1419:17) By 1928, the river had obliterated fee land in Sections 22 and 23. (1420:8) Finally, by 1930, Abrahamson concluded "all of the fee patented tracts had been obliterated." (1420:22-23) Relinquished allotments in the western Barrett Survey were likewise eroded away by 1930. (1424:9)

Abrahamson drew a line across the western half of Section 13. This line marked the farthest eastward progression of the river after 1923. Lands east of this line were not obliterated by the river during this period. (1425:7, *et seq.*) Additionally, this line coincided with a "relief" which Abrahamson observed on the ground across the western half (WZ) of Sections 13 and 24. (1421:18) By the term "relief," he meant a difference in elevation between the eastern "not obliterated" lands and those tracts in the western Barrett Survey. He concluded the land to the west of this "relief" constituted a continuous piece of land, extending to the present location of the river. (1422:10, 1423:20)

2. Dr. Robinson's conclusions are consistent with Abrahamson's testimony. He conducted soil composition studies of both the surface and subsurface geology of the Blackbird Bend area. (790-792) He agreed that Barrett Survey lands in Sections 13, 19, 20 and 24 were not obliterated by the river when it travelled east to its 1928-1930 position. (1292:19-22). The western Barrett Survey was part of the riverbed during this period. Dr. Robinson stated the river moved westward after 1928 and the artificial structures built in the mid-1930s aided this process. (1102:11-12) The purpose of the Corps' projects was to confine and "straighten" the river. Consequently, the river's "gradient increased and the erosive power of the river was increased, and the level (of the riverbed) dropped. . . . " (1094:3-9) Dr. Robinson concluded that the river eroded the land in the western Barrett Survey when it moved west after 1930, because the dikes and abatis caused the river to be "shortened" and because the level of the riverbed was lowered. (1096:24-25) As a result of the lower river level, land in Sections 11, 14 and 23 reemerged and

became stable. (1094:11-18) These new lands were "continuous," extending from Section 13 westward. (1097:10-16) Dr. Robinson testified that the reemergence of new land was an "imperceptible" change occurring after 1923. (1096:5-8). The western barrett Survey land which appeared as the river receded is identifiable and in place today. (1098:25-1099:1)

3. The Tribe's witness, Mr. Clark, observed that river levels in the Blackbird Bend area reflected a wet cycle from 1920-1930 and a drought period from 1930-1940. (505:9-11) He stated the Corps' dikes and abatis, together with private structures, diverted the river westward in the Barrett Survey and prevented the encroachment of the river upon eastern Barrett Survey land. (398-399) Additionally, upstream impoundments of the river after 1935 affected the flooding, erosion, accretion and reliction of the river throughout the western Barrett Survey. (502, 520-521)

Summarily, the Tribe's witnesses agreed that western Barrett Survey lands were first obliterated by the eastward progression of the river from 1923-1928; new land reappeared in this area attaching by accretion and reliction to Sections 13 and 24 when the river eroded and receded westward from 1928-1943. Defendant's experts drew substantially the same conclusion.[6]

Most significant is the testimony of Mr. Raymond Huber concerning the effect of the dikes and abatis built in the Barrett Survey during this period. (2092:23, *et seq.*) The dikes served to "train the river over into the alignment which was designed by the Corps of Engineers." (209:23-24) A dike, Huber stated, causes deposition and accretion to repar-

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[6] See, testimony of Dr. George Hallberg (geologist), at 2654:18; 2690, *et seq.* Significantly Hallberg concluded the land in Section 11 was formed after 1927 by "accretion type bar deposits." (2702:8-24) And land in Section 14 and 23, as shown on the 1940 map, were accretions to the east bank. (2708:20-2709:8) See also Testimony of Mr. Huber, who worked in this area for the Corps of Engineers after 1936. (1982:8; 2083;2 *et seq.*) He agreed that western and southern portions of the Barrett Survey were eroded away through 1928 and 1930. (2085:3-17; 2086:7-10) Huber concluded, generally, that from 1923 to 1940, the river moved east and then west, by erosion and accretion. (2102:23-2103;3)

ian land because it slows the current of the river.[7] (2094:3-4) Huber also referred to the private levees constructed to drain as well as to shield eastern Barrett Survey lands from encroachment by the river. (2101:3) None of these structures, he concluded, were built to cause an avulsion. (2095:10)

4. The growth of vegetation during this period, as shown by the maps and photographs, is consistent with the movement of the river by erosion against the right bank and accretion deposition and reliction to the left bank.[8] Similarly, soil samples taken from the western Barrett Survey consist primarily of silts, fine sand or very fine sand. Exhibit, Gov't 151. These materials are not cohesive and are easily erodable. (2537:13-16) These are soils typically deposited in an alluvial floodplain following the migration of a river.

C. *The State of Iowa's island and abandoned channel theory*

Under the terms of the Iowa Nebraska Boundary Compact, the areas claimed by the State of Iowa was ceded by the State of Nebraska. Therefore, Nebraska law governs title claims based upon land formed in this area prior to the Compact date of July 12, 1943. *Nebraska v. Iowa*, 406 U.S. 117, 120, 92 S. Ct. 1379, 1381, 31 L.Ed.2d 733 (1972). However, Iowa law controls events occuring after the Compact date. *State v. Simmons*, 290 N.W.2d 589, 593 (Iowa 1980), *cert. denied*, 449 U.S. 842, 101 S. Ct. 123, 66 L.Ed.2d 50 (1980). In Iowa, the State owns the bed of all navigable streams from the ordinary high water mark to the "thread" or center of the stream, as well as all islands arising therefrom. *Mather v. State*, 200 N.W. 2d 498, 500 (Iowa 1972). In Nebraska, the riparian proprietor owns the riverbed to the thread of the stream and all islands which develop by accretion to the stream bed. *Valder v. Wallis*, 196 Neb. 222, 242

[7] An abatis likewise slows the flow of the river, causing deposition downstream as well as upstream. (2131:20-25) Huber testified an abatis in the Barrett Survey formed accretion in Section 14. (2143:17)

[8] The Court of Appeals noted: "A large stand of timber shown in the northwest corner of the Barrett Survey area prior to 1923 was no longer visible in a 1927 aerial survey of the area, indicating the land on which it stood had been eroded." 575 F.2d at 649, n. 63.

N.W. 2d 112 (1976); *Thies v. Platte Valley Public Power and Irrigation District*, 137 Neb. 344, 289 N.W. 386 (1930).

The State of Iowa admits the western edge of the Barrett Survey was a part of the bed of the Missouri River between 1923 and 1931.[9] The State, however, asserts the land it claims consists of an island and exposed, abandoned river channels which did not form until after 1943. Therefore, the State of Iowa claims title to the tracts based upon the Equal Footing Doctrine and the doctrine of state ownership of the bed of navigable streams, *Montana v. United States*, 450 U.S. 544, 101 S. Ct., 1245, 67 L.Ed2d 493 (1981); Oregon, *ex rel.* State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed.2d 550 (1977); *State v. Simmons, supra; Mather v. State, supra.*

The Tribe contends that the land occupying the area the State claims developed as accretions and relictions to riparian tribal land, not as an island or abandoned channel. The United States argues, alternatively, that if an island did form, it was a permanent formation prior to 1943. Under Nebraska law, the Government and the Tribe, as riparian land owners, would also own the "island."

The State's claim under the doctrine of state ownership of the bed and banks of navigable rivers is inconsistent with the theory upon which it relied at the close of the trial of this case. The State joined in the post-trial brief of defendants, in which the State asserted the eastward movement of the river from 1923-1930. Thereafter, the State agreed the river moved westward by accretion to the left bank.[10] Significantly, the State also joined in defendant's statement that, " . . . all parties agree that the fee patented lands were eroded away and washed down the river. They disagree as to the ownership of the land to which the accretion land, now occupying the area formerly occupied by the fee patented land, became attached."[11] The State's position at the close of trial was that the land it claims formed as accretions to riparian mainland

[9] Iowa Proposed findings and Conclusions, on Remand, No. 40. See, Exhibits R-4, S-4, V-4, Y-4, 41 and 42.

[10] Defendant's Post-Trial Brief, filed February 16, 1977, at p. 30.

[11] *Id.* at 46.

owned by other defendants, who conveyed their interest in such lands to the State by quit claim deeds. Specifically, the State joined in asserting Proposed Conclusion of Law, No. VII, which concluded that all of the land within the Barrett Survey formed as accretions to the left or Iowa bank, prior to 1943.

The State on remand, however, proposed that the land it claims did not accrete to the left bank prior to 1943. Instead, it asserts the tracts formed as an island accreting to the riverbed apart from the left bank, and as an abandoned river channel, after 1943.

An island traditionally is defined as a permanent body of land, separate and distinct from the mainland, and above mean high water. An island must be surrounded by distinct channels of the river, which separate the island from the mainland. *Burket v.Krimlofski*, 167 Neb. 45, 91 N.W.2d 57 (1958); *Summerville v. Scotts Bluff County*, 182 Neb. 311, 154 N.W.2d 517 (1967); *State v. Raymond*, 254 Iowa 828, 119 N.W.2d 135 (1963); *Mather v. State, supra.*

The State of Iowa presented no testimony at trial to support its post-1943 "island" and abandoned channel theory. Nonetheless, the State refers to maps and aerial photographs of the western Barratt Survey.[12] These exhibits allegedly trace the development of an "island" adjacent to and south of dike 749.3, in Sections 14, 15 and 23. The area adjacent to and north of the dike is the land the State claims as an abandoned river channel. A 1944-1945 aerial photographic mosaic, the State concludes, depicts an "island" in permanent existence for the first time. Wilson Exhibit H-5. The State claims this island formed as a sandbar within the Iowa portion of the riverbed, separated at all times from the Iowa shore by a well-defined channel.[13]

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[12]Exhibits Wilson K-K, L-L (photographs of dike); Wilson Exhibits B-5 (1937 Corps map); F-5 (1940 map); G-5 (1941 map); *see also,* Wilson Exhibits J-5, K-5, and M-5; Iowa Exhibits HO8, IO8, KO8 (Mylar overlays).

[13]The State argues that dike 749.3 contributed to the development of Ivy Island from a sandbar in the riverbed. In its Proposed Findings and Conclusions, post-trial, however, the State asserted, "[t]hese dikes and abitis had the effect of forming accretion to the Iowa riparian land adjacent to the dikes (2093:24)." at p. 36.

In considering a claim that an island arose from the riverbed, separated from both riparian banks, certain evidence is relevant. For example, in *Tyson v. State of Iowa*, 283 F.2d 802 (8th Cir. 1960), the Eighth Circuit Court of Appeals considered eye witness testimony, photographs, land surveys, and dendrochronology studies reporting the size, age and location of vegetation. In this case, the State offered no testimony, eye-witness or otherwise, supporting the development of an island and abandoned river channel. This fact is particularly remarkable in view of the time period involved. Witnesses would certainly be available to testify concerning developments occurring only after 1943. The State offers photographic evidence of its theory, however.

Specifically, the State relies upon the 1944-1945 photomosaic, depicting the "island" as a permanent formation. On this basis, the State contends the island could not have developed prior to 1943. Unfortunately, no photograph offered by the State depicts the area as it appeared *in 1943*. There is a gap of three years in the State's proof—from 1941 (photo exhibit G-5) to 1944-1945 (exhibit H-5). The State wishes this Court to speculate concerning the permanence of the land it claims in light of the development of vegetation. It is, however, only an "educated guess" by the State that vegetation appearing in 1944 was not also present before 1943. Indeed, the land in the area of the State's claims does appear to be supporting some vegetation in the 1941 aerial photograph. Additionally, the Tribe offered Exhibit 105A, a summary of a dendrochronology study of Blackbird Bend conducted by George S. Gorsuch. (1357:4, *et seq.*). In the area comprising the State's claimed "island," the study located some cottonwoods aged forty-two years, originating in 1943. It is undisputed that cottonwoods are secondary vegetation, which will not grow until after the land is dry, established, and capable of supporting primary growth, such as willows. 433 F.Supp. at 76. As the Court of Appeals stated, " . . . vegetation does not usually appear on a sandbar until it has been in existence for several years." 283 F.2d at 810.

Therefore, this Court concludes the State, on remand, referred to only speculative evidence concerning its claims that Ivy "Island" was a permanent formation only after 1943. Moreover, the State cited no testimony concerning the formation of an independent island—in order to refute its previous position that the land comprising Ivy "Island" constituted accretions to the left bank. The State offered no evidence at trial concerning the nature of the channel which it claims separated the "island" from the left bank. Aerial photographs taken in 1945 and 1954 could equally support the conclusion that Ivy "Island" was surrounded by water "only when the river [was] high and connected with the mainland when the river [was] low." *Mather v. State*, 200 N.W.2d 498, 501 (Iowa 1972). In fact, Doyle Abrahamson testified that the stream appeared to the east of the "island" after the land had already formed as accretions and relictions to the left bank. (1427:19-1429:14). Accordingly, the Tribe argues it retains title to the accretions. This position is consistent with the law of Nebraska, which provides, "[w]here an accretion was begun by a deposit against the shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from the belonging to the mainland owner." *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647, 649 (1935).

FINDINGS OF FACT ON THE MERITS

From all the evidentiary matters considered, the Court finds:

1. That in 1928, the Missouri River cut entirely across Nebraska Sections 10, 11, 14 and 15, within the Barrett Survey. By the process of erosion, the riverbed and the left bank were obliterated.

2. That from 1923 to 1928, the river gradually migrated eastward in the Barrett Survey. During this migration the river eroded and obliterated land occupying the left bank and the riverbed. The 1928 left bank of the river represented the

farthest eastern migration of the river in the Barrett Survey after 1923.

3. That in 1928, the left bank of the river occupied the west half of the west half of Sections 13 and 24. The river occupied substantially all of the tracts claimed by the State of Iowa as well as the entire area described in the fee patents which individual defendants claimed. As a result of the erosion of the river through 1928, all of the land within the Barrett Survey west of the 1928 left bank was obliterated and no identifiable land remained in place.

4. That from 1928 to 1943, the Missouri River reversed its direction and migrated westward over the Barrett Survey. The river further eroded and excavated the right bank and gradually and imperceptibly deposited silt and sediment upon the left bank. These accretions attached to fast, stable land in Sections 13 and 24 which were riparian to the left bank of the river between 1927 and 1930.

5. That artificial structures, including an abatis, dikes and levees were constructed across the western Barrett Survey by both the Corps of Engineers and private individuals. The purpose of these structures was to create accretions to land adjacent to the structures, to drain or protect eastern Barrett Survey lands, and to train the river into a designed channel. These structures contributed to the gradual subsidence of the river, westward, from the 1928 left bank. By this additional process of reliction, new lands were uncovered and added to the left bank.

6. That by 1943, the accretions and relictions were new lands contiguous to Sections 13 and 24 and continuous westward to the present location of the Missouri River. Sebsequent to the formation of these continuous accretions, an intermediate stream cut across Sections 10, 11, 14, 15, 22 and 23. This stream separated accretions adjacent to the Iowa-Nebraska Compact Line from the mainland, thereby creating the body of land known as Ivy "Island." Ivy "Island," therefore did not form by accretion to the riverbed, below the ordinary high watermark.

7. That the State of Iowa presented no evidence to establish a factual predicate for its conslusion, on remand, that the land south of dike No. 749.3 formed as an island in the Iowa portion of the riverbed after 1943 or that the land north of dike No. 749.3 is an abandoned river channel. This Court's findings concerning the tracts claimed by the State of Iowa are not based upon inferences drawn from any weaknesses in the State's evidence tending to prove its island and abandoned channel theory. Rather, the findings of this Court are based upon the clear preponderance of the evidence, presented by both the Tribe and defendants, that the river changed during this period by creating continuous accretions and relictions to the left bank riparian land.

8. That there is no substantial evidence defendants or their predecessors possessed any fee patented tracts during the time the river occupied the western Barrett Survey from 1923 to 1930.[14] The dry lands defendants occupied after the river finally receded from the western Barrett Survey were not the original fee patented lands. The defendants entered upon new lands fromed by accretion and reliction to stable land in Sections 13 and 24. These accretions replaced the fee patented tracts which were eroded and washed away by the river prior to the entry by defendants or their predecessors.

9. That no party to this case either pleaded or submitted evidence to prove that the river moved by avulsion from 1923-1943.

CONCLUSIONS OF LAW

1. The Court of Appeals ordered this Court to quiet title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee, and in the Omaha Tribe. This order establishes as the law of this case that the Tribe is the owner of all Barrett Survey land

[14] For example, concerning the fee patented tracts, counsel for defendant stated: "We know nothing about them being abandoned except nobody was occupying them while they were in the bottom of the river." (113:8-10)

east of and including Sections 13 and 24. Additionally, based upon the Court of Appeals' mandate, the United States and the Tribe own those allotted parcels to which trust patents were issued but subsequently relinquished or cancelled—except those claimed by the State of Iowa.[15] The river movements relevant to the ownership of the remaining lands within the western Barrett Survey are those described above, which occurred from 1923-1943. Both the Tribe and the defendants offered proof that the river changed by accretion and reliction.

2. Federal law, borrowing the Nebraska rule of decision, governs this Court's determination of river movements over Barrett Survey land. The prior opinions in this case set out the law of accretion and reliction in Nebraska. 433 F.Supp. at 62-65; 575 F.2d at 633-639; 614 F.2d at 1156-1160. Two elements are essential to a finding of accretive changes in a river: First, "[a] boundary changes only where the river's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of identifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated." 614 F.2d at 1157; *State v. Ecklund*, 147 Neb. 508. 23 N.W.2d 782, 789 (1946); second, " . . . no matter how 'rapid and great' is 'the abrasion and washing away,' or 'the diminution' of soil, the accretion (or reliction) of soil 'is always gradual and by imperceptible deposit of floating particles of earth.'" 614 F.2d at 1157, *quoting, Nebraska v. Iowa*, 143 U.S. 359, 368-369, 12 S.Ct. 396, 399, 36 L.Ed. 186 (1892). Both elements must be present.

"Reliction" is the term applied to land added and uncovered by a gradual subsidence of water from any cause. *Durfee*

[15] Allotted lands are owned by the United States, as trustee, for the benefit of the allottee. *See*, 25 U.S.C. § 348; *Tooahnippah v. Hickel*, 397 U.S. 598, 90 S.Ct. 1316, 25 L.Ed 600 (1970); *County of Thurston, State of Nebraska v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert.denied*, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1978). It follows that the allotted tracts remain trust lands whether the patient is subsequently relinquished or cancelled under 25 U.S.C. § 344. As such, the tracts are governed by the Court of Appeals' order to quiet the Tribe's title in trust lands claimed by the individual defendants.

v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959); *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960); *Dartmouth College v. Rose*, 172 Neb. 764, 112 N.W.2d 256 (1961). Land added by either accretion or reliction to riparian land is the property of the riparian owner. *Id.; Fontenelle v. Omaha Tribe of Nebraska*, 298 F.Supp. 855, 859 (D.Neb. 1969) *aff'd*, 430 F.2d 143 (8th Cir. 1970).

3. The Tribe sustained its burden of proving, by a clear preponderance of the evidence, (a) that the tracts claimed by the State of Iowa were washed away by the action of the river eroding its bed and banks; and (b) that by a gradual and imperceptible process of deposition and reliction, new lands were created which attached to and extended westward from riparian tribal trust lands in Sections 13 and 24, continuously, to the present location of the river. The State of Iowa, therefore, has no claim or right thereto based upon river movements occurring after 1923.[16]

The Tribe proved the accretions and relictions to tribal land were caused, in part, by the projects of both the Corps of engineers and private individuals.

It is well settled that the fact that artificial means caused, in whole or in art, the working of the processes of accretion or reliction does not affect the rule that a riparian owner takes new land formed against his tract. *Bonelli Cattle Co. V. Arizona*, 414 U.S. 318, 94 S.Ct. 517, 138 L.Ed.2d 526 (1973),

[16] The State's claim to western Barrett Survey lands based upon quitclaim deeds from other defendants also falls. A quitclaim is used by a grantor to convey only such interest as he has, in contradistinction to a grant of the fee or other estate with warranty of title. *United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 505 (1977); *Walters v. Walters*, 231 Iowa 1267, 3 N.W.2d 595 (1942); *Mack v. Tredway*, 244 Iowa 240, 56 N.W.2d 678 (1953); *Swab v. Appanoose Country Club*, 203 N.W.2d 318 (Iowa 1972); *Kennedy v. Potts*, 128 Neb. 213, 258 N.W. 471 (1935); *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). "[U]nder a conveyance by a quitclaim deed the grantee can acquire no better interest than the grantor had. If the grantor himself has no title or interest to the property conveyed, most courts hold that the grantee takes nothing under a quitclaim deed . . . ." 23 Am.Jur.2d, *Deeds* § 291, at p. 324. Based upon this Court's findings and conslusions, the individual defendants had not title to western Barrett Survey land. It follows that the State takes no title under a quitclaim deed from the defendants.

rev'd on other grounds, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550; *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 56, 23 L.Ed. 59 (1874); *Duke v. Durfee*, 215 F.Supp. 901 (D.Mo.1961), *rev'd on other grounds*, 308 F.2d 209 (8th Cir. 1962), rev'd, 376 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963); *Kansas v. Meriwether*, 182 F. 457 (8th Cir. 1910). In *Krumweide v. Rose*, 177 Neb. 570, 129 N.W.2d 491 the Nebraska Supreme Court referred to a channelization project similar to that of the Corps of Engineers in this case. The court held, ". . . this development work finally resulted in the destruction of the western channel . . . and the acceleration of accretion . . . The fact that third parties performed construction work and accelerated these processes does not alter the application of the rule as to ownership of accretion land." 177 Neb. 570, 129 N.W.2d 491, 496 (1964). *Accord, Valder v. Wallis*, 196 Neb. 222, 242 N.W.222, 242 N.W.2d 112 (Neb.1976); *Krimlofski v. Matters*, 174 Neb. 774, 119 N.W.2d 501 (1963); *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957).[17]

4. By virtue of the Court of Appeals mandate, the United States, as trustee, and the Tribe own trust lands in Sections 13 and 24 of the Barrett Survey. These lands were riparian to the 1928 left bank of the Missouri River, when it moved easterly in the Barrett Survey. Accretions to land owned by the United States in Sections 13 and 24 are also lands owned by the United States. *United States v. Boyd*, 458 F.2d 1252 (6th Cir. 1972); *United States v. Claridge*, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1970); *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937, 86 S.Ct. 1067, 15 L.Ed.2d 843 (1966). This general rule applies equally to lands which the United States owns in trust for an Indian tribe. *Wilson*, 442 U.S. at 673, 99 S.Ct. at 2540; *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970);

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[17] See also, Lundquist, *"Artificial Additions To Riparian Land: Extending the Doctrine of Accretion*, 14 Ariz.L.Rev. 315 (1972); *Beck, The Wandering Missouri River: A Study in Accretion Law*, 43 N.D.L.Rev. 429, 449 (1967); 63 A.L.R.3d 249.

United States v. Flower, 108 F.2d 298 (8th Cir. 1939); *Newman v. United States*, 504 F.Supp. 1176 (D.Ariz.1981).

5. The Court of Appeals first observed that "[t]he Government excepted from its complaint any claim to approximately 400 acres of land which may have been allotted to individual Indians and subsequently patented to non-Indians." 575 F.2d at 651, n.70. The United States Supreme Court also noted several hundred acres of land within the Barrett Survey were claimed as fee patented lands. 99 S.Ct. at 2529. Individual defendants, as well as the State of Iowa, claimed title to the "fee patented" lands under Nebraska laws regarding adverse possession, statutes of limitation and laches."[18] The Tribe, however, proved defendants never possessed the actual and described in the fee patents because the river obliterated and eroded the fee lands prior to defendants entry thereupon. The lands defendants occupied after the river finally receded were accretions to eastern tribal lands in Section 13 and 24. Consequently, the Tribe argued the defendants cannot adversely possess accretions to Indian trust lands, nor may state statutes of limitation or laches operate to divest Indian title.

It is true that Indian lands, once patented in fee, lose their status as trust lands and are governed by state law. *Larkin v. Paugh*, 276 U.S. 431, 48 S.Ct.366, 72 L.Ed. 640 (1928); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377, 97 S.Ct. 582, 590, 50 L.Ed.2d 550 (1977); *Wilson*, 442 U.S. at 671, 99 S.Ct.at 2539 . This Court finds and concludes, however, the Tribe established by a preponderance of evidence that the river eroded the lands in the western Barrett Survey area, including those described in the fee patents, and replaced those lands with accretions and relictions to trust land in place in Sections 13 and 24.[19]

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[18] Neb.R.R.S., § 25-202 (1943).

[19] The defendants contended 25 U.S.C. § 194 did not operate to place upon them the burden of proof concerning river movements affecting "fee patented" lands. This Court need not address that issue. Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds the Tribe established by a clear preponderance of the evidence its right and claim to the land occupying the area described in the fee patents.

There can be no doubt, however, that 25 U.S.C. § 194 has been a

In both Nebraska and Iowa, the effect of such a movement of the river is to destroy the title to the land obliterated by the movement of the river. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Winkle v. Miters*, 195 Neb. 821, 241 N.W.2d 329 (1976); *Rupp v. Kirk*, 231 Iowa 1387, 4 N.W.2d 264 (1942); *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). This court cannot, therefore, apply state laws of adverse possession or laches based upon the former title to the lands in fee patent.[20] Application of those laws if at all, must be based upon the present character of the title to the accretions.

It is well settled that title by adverse possession, laches, or statutes of limitation cannot be asserted against the United States, *United States v. Denby*, 522 F.2d 1358 (5th Cir. 1975), *reh. denied*, 525 F.2d 693 (5th Cir. 1975); against land which the United States owns in trust for an Indian tribe, *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977); *Schaghticoke Tribe v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); or against land which the United States gains by accretion. *Jackson v.*

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determinative factor in the outcome of this case. In the Appeliate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago. This Court firmly believes the statute thereby provided the Tribe an unconscionable advantage in this litigation. Moreover, the statute arguably operated to deprive these defendants of their constitutional right to equal protection under the law. In this age Indian Tribes are often sophisticated corporations which litigate claims using the legal and financial resources of the United States Government. Consequently, this court believes the special treatment aforded an Indian Tribe under 25 U.S.C. § 194 no longer "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians ..." *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474,2485, 41 L.Ed.2d 290 (1974). Although this issue was not properly before this Court, we would welcome a challenge of the statute, on constitutional grounds, in future cases.

[20]Defendants do not claim to derive title from any original fee patent holder. Rather, they assert title by adverse possession. This current theory presumes the continued existence of the land described in the fee patents, but is inconsistent with defendants' theory at trial—that *all* of the Barrett Survey lands were destroyed by the river. 433 F. Supp. at 71.

United States, 56 F.2d 340,343,(9th Cir. 1932); *Beaver, supra; Claridge, supra.* Since the lands which defendants eventually occupied in the western Barrett Survey were no longer the fee patented lands, but were accretions to tribal lands owned by the United States for the Omaha Tribe,[21] the defenses of adverse possession, etc., are meritless. The new lands forming westernly from Sections 13 and 24 became tribal lands which never were allotted or conveyed to a restricted Indian. The law compels this conclusion even though the new lands occupied the same area described in the fee patents. *See, e.g., United States v. Russell*, 261 F. Supp. 196 (E.D. Okl. 1966).

Defendants cite *Dillon v. Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974) for the rule that fee patent land owned by an Indian may be acquired by adverse possession. *Dillon* did not concern land destroyed or created by accretion and reliction. Defendants continue to equate the precise fee patent land lost by erosion, with the land they occupied when the river finally receded from this area. This premise is groundless in view of the undisputed evidence, offered by both the Tribe and defendants, establishing the destruction of the fee lands by erosion.

6. The defendants finally assert the refusal of the United States to claim the former fee patented lands precludes the Tribe from so doing. Admittedly,

> ". . . when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose *relating to the same property.*"

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[21]This Court holds defendants did not begin to establish the "possession" required by law to constitute an adverse possession until river finally receded from the areas described in the fee patents, sometime after 1930. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). Similarly, in *Pokorski v. McAdams*, 204 Neb. 725, 283 N.W.2d 824 (1979), the Nebraska Supreme Court held that a plaintiff did not establish an adverse possession. During the time the river occupied the land involved, the court found "no persuasive evidence that there was any land present ... which was subject to adverse possession." *Id.*, 285 N.W.2d at 827.

Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 370, 88 S.Ct. 982, 984, 19 L.Ed.2d 1238 (1968) (Emphasis added).

But this rule does not bar the Tribe from recovering tribal lands when the United States refuses to claim the same lands on behalf of the Tribe, or from recovering lands in addition to those the Government claims.

This Court concludes the Tribe may bring an action to recover accretions to tribal lands, notwithstanding the refusal of the United States to add these lands to its complaint in these consolidated cases. Clearly, ". . . Congress intended by (28 U.S.C.) § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act." *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1017 (9th Cir. 1973). "In recovering these lands, the Indians assert not merely their own rights of occupancy, but the sovereign claims of the United States as well." *Schaghticoke Tribe*, 423 F.Supp. at 784. *See also, Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 473, 96 S.Ct. 1634, 1641, 48 L.Ed.2d 96 (1976); *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir. 1975). Accordingly, since the defenses of adverse possession, statutes of limitation, and laches would not be available had the United States claimed the accretions attaching to tribal trust lands, *Board of Commissioners v. United States*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313 (1939); *United States v. Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957), the defenses will not apply to claims by the Tribe, on its own behalf, to recover the same lands. *Schaghticoke*, 423 F.Supp. at 784-785.

For the above-mentioned reasons, this Court concludes the defendants have no right or claim to any land in the western Barrett Survey, including the lands occupying the area described by fee patents.

This Court does not deviate from its original judgment that the Missouri River moved over the Barrett Survey—in

all relevant periods—by accretion to the left or Iowa bank. Contrary to this Court's original decree, however, the Tribe prevails on remand. The Court of Appeals effectively determined this outcome when it quieted title in the Tribe to eastern Barrett Survey lands. Any accretion to the left bank, therefore, added to land which the Court of Appeals held was owned by the Tribe. This Court will not change its view of the evidence and cannot change the mandate of the Court of Appeals.

IV. IMPROVEMENTS

The defendants interpose a counterclaim against the United States for the value of improvements they made upon lands, title to which is now quieted in the Tribe. The defendants assert two theories in support of the counterclaim. First, they contend the general principles of equity are binding upon the United States. As a condition for obtaining equitable quiet title relief, the government must do equity by reimbursing the defendants for improvements. Second, the defendants assert that Nebraska law governs the claim for improvements and that they are entitled to recover under the Nebraska. Occupying Claimants Act (NOCA), Neb.R.R.S., 1943 §§ 76-301 to 76-311. The United States opposes the claim for improvements for two reasons. The government contends sovereign immunity bars the claim. Additionally, the United States argues NOCA cannot apply to this action. For the following reasons, this Court concludes defendants' counterclaim for improvements is barred by the sovereign immunity of the United States.

The United States may be sued, even by counterclaim, only when the government has waived its immunity from suit. *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940); *United States v. Agnew*, 423 F.2d 513 (9th Cir. 1970). The terms of its consent to be sued define any court's jurisdiction to entertain the suit. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed.1058 (1941). Moreover, no waiver of sovereign immunity may be implied, but must be expressed unequivocally. *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). There is no generally implied waiver of sovereign immunity when the United States commences an action. *Federal Savings & Loan Insurance Corp. v. Quinn*, 419 F.2d 1014 (7th Cir. 1969).[22]

Defendants assert the Government is bound, in equity, to pay the value of improvements since it seeks equitable relief. Defendants cite both *United States v. Desert Gold Mining Co.*, 448 F.2d 1230 (9th Cir. 1971), and *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954), and conclude "[t]he Government, when applying for relief in a court of equity is as much bound to do equity as is a private litigant." *Id.* at 225. Even the Court in *Lacy*, however, agreed that this principle cannot be pressed to the extent of waiving the United States' sovereign immunity to suit by way of counterclaim. *Id.*

To interpose a counterclaim for improvements, defendants must either, (1) establish the statutory consent of the United States to the suit, or (2) state a claim in recoupment arising out of the same transaction as the claim of the United States, to which the Government impliedly consents. *United States v. Chatham*, 415 F.Supp. 1214 (D.Ga.1976); *United States v. Holder*, 292 F.Supp. 826 (D.Iowa 1968). Defendants do not identify any statute by which the Government consents

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[22] The Federal Rules of Civil Procedure. Rule 13(d) affirms the general principle of soverign immunity. It specifically states Rule 13 (regarding compulsory and permissive counterclaims) does not extend the right of a party to sue the United States beyond the limits established by statute. Wright & Miller, *Federal Practice & Procedure: Civil* § 1427, p. 139 (1971); *United States v. Longo*, 464 F.2d 913 (8th Cir. 1972).

to a counterclaim for improvements. Consequently, the counterclaim fails if it does not qualify as a claim in recoupment or set-off.

Without violating the doctrine of sovereign immunity, a defendant may assert, by way of recoupment, any claim arising out of the same transaction or occurrence as the original claim, in order to defeat or reduce the Government's recovery. *Frederick v. United States,* 386 F.2d 481 (5th Cir. 1967); *See generally,* Note, *Governmental Immunity from Counterclaim,* 50 Colum.L.Rev. 505 (1950). Even within the recoupment exception, however, the Government "does not waive sovereign immunity to counterclaims . . . which claim relief in excess of or different in kind from that sought by the Government." *In re Oxford Marketing Ltd. (U.S.) v. Kallen,* 444 F.Supp. 399, 403 (N.D.Ill.1978). Accordingly, when the United States sues to quiet title, the Government consents to counterclaims by defendants seeking to quiet title in their names. *United States v. Phillips,,* 362 F.Supp.462 (D.Neb.1973).

A recoupment is the right of a defendant, "to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation . . . or because he has violated some duty which the law imposes upon him. . . 20Am. Jur.2d, *Counterclaim, Recoupment and Set-off,* § 1, p. 228 (1965). "It means a deduction from a money claim whereby cross demands arising out of the same transaction are allowed to compensate one another, the balance only to be recovered." *Id.* For example, in an ejectment action, wherein plaintiff seeks mesne profits, the defendant may counterclaim to recoup the value of improvements. *Deakyne v. Lewes Anglers, Inc.,* 204 F.Supp. 415 (D.Del.1962). In an action by the United States to collect an income tax deficiency, a counterdemand for recoupment of an overpayment of estate taxes may be asserted in defense. *Bull v. United States,* 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935).

When the United States, however, does not seek monetary relief, but only the return of property, the court lacks jurisdiction to entertain a counterclaim for monetary relief.

In *United States v. Ameco Electronic Corp.*, 224 F.Supp. 783 (E.D.N.Y. 1963), the Government brought a replevin action to recover chattels wrongfully withheld by the defendant. The court dismissed the defendant's counterclaim for damages based on unjust enrichment because the claim did not fall within the United States' waiver of immunity for claims in recoupment.

> Recoupment and set-off . . . are restricted to a reduction or in discharge of the principle claim. To accomplish this result, the claim of both the plaintiff and the defendant must be fungible obligations which can be set-off against each other. . . . The Government is not seeking a judgment for a sum of money but is asserting title to certain chattels. The very nature of the action makes it impossible to reduce or discharge the claim by recoupment or set-off. *Id.* at 786.

Similarly, in *United States v. Drinkwater*, 434 F.Supp. 457 (E.D.Va.1977), the court dismissed counterclaims seeking both damages and equitable relief because the United States sought only to quiet its title to certain land.[23]

In this case, the United States seeks only to quiet title to land lying within the original boundaries of the Omaha Indian Reservation. The Government does not request the payment of damages for trespass, or for rents and profits related to the period of defendants' occupancy of the land.[24] The United

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[23] *See also, United States v. Thurber*, 376 F.Supp. 670 (D.Vermont 1974), a mortgage foreclosure action by the United States wherein the Court dismissed counterclaims for damages because the United States did not seek a deficiency judgment or damages.

[24] The Tribe seeks the payment of damages for trespass upon Barrett Survey lands. But that claim of the Tribe was severed and is not properly before this Court in these consolidated cases. It may be that defendant's claim for improvements could be asserted as an off-set to the Tribe's claim, even though the Tribe possesses a common-law immunity from suit which is interpreted similarly to the sovereign immunity of the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1676, 56 L.Ed.2d 106 (1978); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F.Supp. 55 (N.D.Cal.1979). [The defendants, however, stated in their brief, on remand, that they made their counterclaim for improvements only against the United States.] Defendant's Reply Brief, "On . . . Improvements," at p. 11.

States' claim, therefore, does not involve a fungible obligation against which defendant's claim for improvements may be off set. Since the counterclaim does not constitute a claim in recoupment, this Court lacks jurisdiction to entertain the claim. No specific waiver of sovereign immunity exists, express or implied, which would permit defendant's recovery of the value of improvements against the Government. *United States v. Gregory Park, Section II, Inc.*, 373 F.Supp. 317 (D.N.J.1974).

This Court is painfully aware of the record in this case concerning the character of improvements made by defendants and their predecessors. *Wilson*, 433 F.Supp. at 69, 87. This Court further recognizes the obvious principle of equity, that the owner of land has no just claim to anything except the land itself. The true owner should not, without compensation, take valuable and permanent improvements constructed by a claimant in the erroneous belief that he is the owner. While there is a strong policy argument for adjudicating defendant's claim for improvements in this action, ". . . Congress has not so declared." *Shaw*, 309 U.S. at 502, 60 S.Ct. at 662. The absence of a specific waiver of the Government's sovereign immunity limits the jurisdiction of this Court to grant such equitable relief.

This Court, therefore, need not address defendant's claim that the Nebraska Occupying Claimants Act should be applied to determine the value of improvements. Defendants stated in their brief:[25] "We do not take the position that the Nebraska Occupying Claimants Act governs directly. . . . We contend only that a Federal court sitting as a court of equity should follow the Act in exercise of its general equitable powers. . . ." In support of this position, defendants cite *Leighton v. Young*, 52 F. 439 (8th Cir. 1892). *Leighton* did not concern improvements upon Indian lands, nor was an Indian tribe or the United States a plaintiff in that case. The Court of Appeals, however, recognized two relevant principles. First, the Court of Appeals observed, "[t]he equity practice in the courts of the United States is not regulated by

[25] Defendant's Reply Brief on Improvements, p. 12.

state statutes. *Id.* at 443. Second, the Court noted, ". . . under the Nebraska statute the value of improvements is simply declared to be a lien on the land. . . ." *Id.* at 444. *See,* Neb.R.R.S. § 76-306 (1943). To be more precise, NOCA § 76-310 provides that the title of the true owner may be divested by the terms of the Act if the unsuccessful claimant is not paid the value of his improvements.[26]

Clearly, state laws, such as the occupying claimants laws, cannot be used by federal courts, sitting in equity, to encumber or possibly divest the title of the United States to Indian lands. The United States Supreme Court held in this case, that "Indian title is a matter of federal law and can be extinguished only with federal consent. . . ." 99 S.Ct. at 2539. Congress has not consented to the operation of NOCA in respect to lands which the Government owns in trust for the Omaha Indian Tribe.

V. MOTIONS FOR SUMMARY JUDGMENT

The defendants moved this Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for its order granting summary judgment in their favor. By these motions, defendants request the Court to dismiss the Tribe's claims to lands outside the Barrett Survey in Blackbird Bend and to quiet the title of defendants to the same lands. Additionally, defendants seek, by summary judgment, the dismissal of the Tribe's claims for damages for the alleged trespass of defendants upon all Blackbird Bend lands.

Esentially, defendants repeat the arguments in their motions for summary judgment that they made in support of their claim to the "fee patented" land within the Barrett Survey. First, defendants assert they do not have the burden

[26] Neb. R.R.S. § 76-310. The occupant or claimant shall in no case be evicted from possession, or deprived of his right in the premises, except as provided in sections 76-308 and 76-309, and in case the successful claimant shall neglect to elect to take said real estate with improvements, or to convey the same to the occupant or claimant, within such time as the court shall direct, then decree shall be entered in favor of the occupant or claimant upon his payment in court the value of the real estate without improvements. Such decree shall have the effect to transfer and convey to such occupant or claimant the title and rights of the successful claimant.

of proving their superior title under 25 U.S.C. § 194. Since the Blackbird Bend land outside the Barrett Survey was not part of the original reservation established by the 1854 Treaty, defendants allege the Tribe cannot demonstrate the "previous possession or ownership" which triggers the statute. Therefore, the Tribe has the burden of proving its claim to Blackbird Bend land. Additionally, defendants assert that the Tribe's claim to land outside the original reservation arises out of state law, not federal.

Since the Tribe does not claim Blackbird Bend land as original tribal trust land, defendants conclude the Tribe's claim is barred by state laws of adverse possession, statutes of limitation and laches. Because the United States is not joined in the severed cases concerning title to land outside the Barrett Survey, the government's sovereign immunity cannot preclude the operation of the defenses of adverse possession, etc. Defendants finally argue the Tribe admitted the defendants and their predecessors occupied the Blackbird Bend lands for forty years. They conclude no genuine issue of material fact exists in dispute of defendants' claims by affirmative defenses.

In the Eighth Circuit, motions for summary judgment are considered "a harsh remedy . . . to be granted sparingly . . ." *McLain v. Meier*, 612 F.2d 349, 355 (8th Cir. 1979). Rule 56 provides that summary judgment may be granted when the matters considered by the court disclose "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See, Wright & Miller, *Federal Practice & Procedure, Civil* § 2725 (1973). The moving party has the burden of establishing the nonexistence of any genuine issue of fact, and all doubts are resolved against him. *Walling v. Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943). The Court of Appeals holds that a summary judgment should be granted only if the truth is clear. *Trayler v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 218 (8th Cir. 1951); or unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy and he shows affirmatively that the opposing party cannot prevail under the circumstances,

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); or unless the facts entitling the movant to summary judgment are admitted or are clearly established.

The defendants failed to demonstrate the nonexistence of a genuine issue of material fact. One factual issue in dispute concerns the nature of river movements in Blackbird Bend nearly one hundred years ago. The river, by accretion or avulsion, could have created new tribal lands in Blackbird Bend which may not be acquired by adverse possession, statutes of limitation or laches. Another genuine issue of fact concerns the date of defendants' entry upon lands in Blackbird Bend and the sufficiency of the acts defendants allege constitute and adverse possession. Whether the Tribe ever acquiesced in defendants' possession of Blackbird Bend is an issue of fact. Moreover, with respect to lands within the Barrett Survey which belong to the Tribe, the jury may find the defendants committed a trespass. As long as "the slightest doubt remains as to the facts," there exists a genuine issue. *Armco Steel Corp. v. Realty Investment Co.*, 273 F.2d 483 (8th Cir. 1967).

In view of the complexity of the evidence and claims presented in this case through trial and appeals lasting seven years, this Court cannot conceive of an action less appropriately disposed of by summary judgment.

The foregoing constitutes this Court's Findings of Fact and Conclusions of Law.

APPENDIX G

UNITED STATES of America, Appellee,

v.

Roy Tibbals WILSON, et al., State of Iowa, Appellant.

OMAHA INDIAN TRIBE, etc., Appellee,

v.

Harold JACKSON, et al., State of Iowa and Iowa State Conservation Commission, Appellants.

OMAHA INDIAN TRIBE Appellee,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al., State of Iowa and Iowa State Conservation Commission, Appellants.

UNITED STATES of America, Appellee,

v.

Roy. Tibbals WILSON, et al., Appellants.

OMAHA INDIAN TRIBE, etc., Appellee,

v.

Harold JACKSON, et al., Appellants.

OMAHA INDIAN TRIBE, Appellee,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, et al.

UNITED STATES of America, Appellee,

v.

Roy Tibbals WILSON, et al., RGP, Inc. and Otis Peterson, Appellants.

OMAHA INDIAN TRIBE, etc., Appellee,

v.

Harold JACKSON, et al., Otis Peterson, Appellants.

OMAHA INDIAN TRIBE, Appellee,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al., RGP, Inc. and Otis Peterson, Appellants.

Nos. 81-2350, 81-2351 and 81-2384.

United States Court of Appeals, Eighth Circuit.

Submitted May 18, 1982.

Decided Oct. 26, 1982.

Rehearing and Rehearing En Banc Denied Dec. 1, 1982.

Opinion on Denial of Rehearing June 10, 1983.

Carol E. Dinkins, Asst. Atty. Gen., James J. Clear, Martin Green, Attys. Dept. of Justice, Washington, D. C., for appellee.

Thomas J. Miller, Atty. Gen. of Iowa, Elizabeth M. Osenbaugh, John P. Sarcone, Asst. Attys. Gen., Des Moines, Iowa, for appellants State of Iowa and Iowa State Conservation Com'n.

William H. Veeder, Washington, D. C., for Omaha Indian Tribe.

Robert J. Becker, Donald J. Buresh, Edson Smith, Swarr, May, Smith, Andersen & Jensen, Omaha, for Roy Tibbals Wilson, Charles Lakin, Florence Lakin and Harold Jackson.

Peter J. Peters, of Peter J. Peters, P. C., Council Bluffs, Iowa, for RGP, Inc. and Otis Peterson.

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

The present controversy grows out of the overall litigation affecting ownership of 2900 acres of land contiguous to the Missouri River formerly occupied by the Omaha Indian Tribe (Tribe) as part of the Omaha Indian Reservation. The land is within an area called the Barrett Survey; it was reserved by the Tribe according to the terms of an 1854 Treaty whereby the Tribe ceded its lands west of the Missouri River to the United States. Treaty of March 16, 1854, art. 1, 10 Stat. 1043. The eastern boundary of the Reservation was the Missouri River. Commencing in 1879 the course of the erratic and uncontrolled river began changing in the Barrett Survey area, giving rise to this boundary dispute. The detailed facts of the dispute are fully set out in our earlier decisions. *Omaha Indian Tribe v. Wilson,* 575 F.2d 620 (8th Cir. 1978) (hereinafter referred to as Omaha I), vacated and remanded, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979), and *Omaha Indian Tribe v. Wilson,* 614 F.2d 1153 (8th Cir.) (hereinafter referred to as *Omaha II*), cert. denied, 449 U.S. 825, 101 S.Ct. 87, 66 L.Ed.2d 28 (1980).

In *Omaha II,* we ordered title quieted in the Tribe and the United States as trustee for the Tribe to approximately 2200 of the 2900 acres involved in the controversy. The 2200 acres constituted reservation land held in trust by the United States, and claimed by individual landowners. Central to our holding was the applicability of 25 U.S.C. § 194,[1] which operated to shift the burden of proof from the Tribe and the United States to the individual landowners with respect to the trust lands. Left undecided in both *Omaha I* and *Omaha II* were the Tribe's claims to nontrust lands in

[1] 25 U.S.C. § 194 reads:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

the possession of the individual landowners until 1975 and to lands in the possession of the State of Iowa until 1975.

The State of Iowa acquired the land now in controversy by quitclaim deeds and by its sovereign ownership of islands and abandoned river channels. In *Omaha II*, following the earlier mandate of the United States Supreme Court, we remanded the claim regarding the State of Iowa's land because section 194 was deemed inapplicable to a sovereign state. 614 F.2d at 1161. The remainder of the land in controversy was patented in fee by the United States prior to 1940 and thus was not part of the trust lands. In *Omaha I* we noted the United States government had excepted from its complaint any claim to some 400 acres within the Barrett Survey that may have been allotted to individual Indians and subsequently patented to non-Indians. The Tribe's claim to this land was remanded to the district court at that time. 575 F.2d at 651 n.70.

In the district court's latest ruling,[2] title to the entire 2900 acres was quieted in the Omaha Indian Tribe and the United States as trustee for the Tribe. Appeal from this judgment has been taken by the State of Iowa and individual landowners asserting claims to some 700 acres of the land. The basic dispute on this appeal is the meaning of the Supreme Court's opinion as well as the court's earlier remands and directions.

In review, of *Omaha I* the Supreme Court found that this court's application of section 194, which placed the burden of proof on the landowners rather than on the Tribe, was correct. On this basis in *Omaha I* and *Omaha II* we found under applicable federal law that the landowners failed to meet their burden of proof that the Missouri River movements at the critical times in issue had produced accretive lands to the Iowa bank of the Missouri River. We held the evidence of the landowners was speculative and conjectural regarding whether the river movement between 1879 and 1923 had changed by avulsive movements or by slow and imperceptible deposits of accretion to the Iowa bank as

[2] *United States* v. *Wilson*, 523 F.Supp. 874 (N.D.Iowa 1981).

claimed by the landowners. On the basis of our initial conclusion that the Tribe had established legal title to the trust lands prior to the movements of the river in question, and had therefore established presumptive title under section 194, *Omaha I*, 575 F.2d at 631, we directed that title be quieted in the Tribe and the United States as trustee for the Tribe when the landowners failed to carry their burden of proof.

On remand of the Tribe's claims to the fee-patent lands and the State of Iowa's lands, the district court held that title to the entire 2900 acres, including the fee-patent lands and those claimed by the state, should be quieted in the Tribe and the United States as trustee. The district court, albeit reluctantly,[3] reasoned the "law of the case" (*Omaha II*) required quieting title to the trust land in the Tribe; that subsequent to 1923 the river completely eroded and washed away all the fee-patent lands and State of Iowa lands, and that thereafter, when the river moved west again new land accreted to the trust land quieted in the Tribe in *Omaha II;* and further that the Tribe had proven the "new" land claimed by the State and the individual landowners had accreted to the Tribe's reservation land. The court, reasoned that adverse possession and statutes of limitations were not valid affirmative defenses against the Tribe and the United States as trustee.

I. ***Tribe's Claim to State of Iowa Lands.***

Of the various issues raised on this appeal, we need focus only on the question of the burden of proof, and the meaning of *Omaha II*. In the typical quiet title action, where a protective statute such as section 194 is not operative, the burden of proof is on the claimant, which here is the Tribe. The Supreme Court specifically ruled that the State as a sovereign was not affected by section 194 and that as to the

[3] The district court, feeling the result inequitable, invited further constitutional attack on section 194. *Cf. Omaha I*, 575 F.2d at 631 n.18 (noting that constitutional attack is answered by *Morton v. Moncari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2484-85, 41 L.Ed.2d 290 (1974)).

original claim made by the Tribe, affecting state lands, the burden of proof remained on the Tribe.[4]

The fundamental question relates to the scope of that burden of proof. We have previously stated that the party bearing the burden of proof had the task of showing "whether the thalweg moved by accretion or avulsion in the critical time periods involved," *Omaha I*, 575 F.2d at 650; *see Omaha II*, 614 F.2d at 1156, 1161, and that the critical time periods were from 1879 to 1923, and post-1923. Here the Tribe claims land in the western portion of the Barrett Survey area. Plate I taken from the Tribe's brief depicts the areas in controversy.[5]

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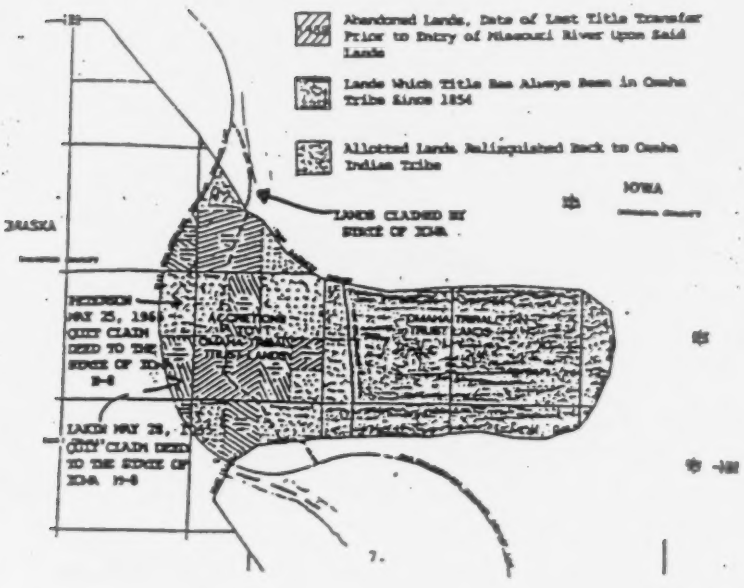
[4] Contrary to the government's suggestion, this court, as well as the Supreme Court, clearly held that section 194 placed the burden of *persuasion* on the landowners to show their title by reason of accretion to the Iowa bank.

[5] The legend is that of Tribe's counsel and is not intended to reflect the court's ruling.

PLATE I


Abandoned Lands, Date of Last Title Transfer Prior to Entry of Missouri River Upon Said Lands
Lands Which Title Has Always Been in Omaha Tribe Since 1854
Allotted Lands Relinquished Back to Omaha Indian Tribe
IOWA
NEBRASKA
LANDS CLAIMED BY STATE OF IOWA
HENDRICH MAY 25, 1965 QUIT CLAIM DEED TO THE STATE OF IOWA P-6
ACQUETTEAU TOWN TRACT TRUST LANDS
OMAHA TRIBAL TRUST LANDS
LAKIN MAY 28, 1965 QUIT CLAIM DEED TO THE STATE OF IOWA P-6

The district court in applying the law of *Omaha II* found that this court determined that the Tribe was the rightful owner of 2200 acres of the former reservation land. We did so, however, solely by reason that the landowners failed to carry their burden of proof. On this basis, we ruled that as against the individual defendants seeking to retain the trust lands under section 194 presumptive title remained in the Tribe.

It is tempting to follow the district court's line of reasoning and assume that these westernlands accreted to the trust land and thus belong to the Tribe. However, we find that reasoning misleading because it allows the Tribe to bootstrap section 194 in asserting its claim against the state.

Our holding in *Omaha II* established the law of the case only between the litigants involved, to wit, the private landowners and the Tribe. Our holding could have no effect on the ongoing and simultaneous dispute between the State of Iowa and the Tribe because the Supreme Court held that the State was not a white person within the meaning of section 194. The State has from the commencement of the litigation denied the Tribe's assertive ownership to the entire land area within the Barrett Survey. Under the Supreme Court mandate, it is clear that for the Tribe to be successful against the State the entire controversy must be viewed as if section 194 had never been passed.[6] Thus, with regard to State lands the Tribe has the burden of proof to show that the earlier river movements between 1879 and 1923 were avulsive changes, thus establishing no change of title in trust lands.

That we contemplated this burden of proof in *Omaha II* is indicated by the following passage, which we now realize was less than clearly stated:

> The record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land

[6] Our original holding against all the landowners, including the State of Iowa, was premised on the fact that both the State and the private landowners had failed to carry their burden of proof under section 194. This was error, since, as the Supreme Court ruled, section 194 does not apply to the Tribe's claim against the State.

> allegedly owned by the State was cut away from the reservation by avulsion. Under the circumstances, we feel the Tribe's case against the State should be separately remanded, and an opportunity given to . . . point out specific evidence relied upon to show avulsion on the particular land claimed by the State.

614 F.2d at 1161 (footnote omitted).

On the basis of the above reasoning, we again remand to the district court the question of ownership of the land claimed both by the Tribe and by the State. The district court must evaluate the record as to the Tribe's claim to the land previously possessed by the State by placing the burden of proof on the Tribe to establish that the critical westward river movements from 1879 to 1923 were avulsive.[7]

II. *Fee-Patented Lands.*

We now discuss the claim of the other landowners who, prior to the district court's issuance of the preliminary injunction, asserted title by adverse possession to lands once within the reservation, but divested by the United States and the Tribe before the river movement began in 1879.[8]

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[7] Although we indicated the landowners' proof was speculative whether the river moved by avulsion or accretion in both *Omaha I* and *Omaha II*, we did not assess the evidence in terms of whether the Tribe carried its burden of proof that there was avulsive movement to sustain the claim of the Tribe. This was not the issue. We acknowledge the district court originally held that the Tribe did not carry its overall burden that the river movements were by avulsion. We vacated that ruling beause it erred in making the proper assessment of where the burden actually lay.

For the Tribe to be successful against the State, it must show the land east of the nonobliterated line (*see* Plate I) belongs to the Tribe by reason of the Tribe carrying its burden of proof that the river movements were by avulsion. This court's ruling that title was quieted in the Tribe affected only the claim to the trust lands east of the nonobliterated line. Insofar as the State's lands are involved in the same litigation our holding did not affect the State of Iowa.

[8] The record is not clear as to which lands within the disputed 700 acres were divested by the Indian Tribe and the government and which were not. The Tribe contends some of the area was allotted land relinquished back to the Tribe. *See* Plate I. Assuming the Tribe can establish that land was relinquished back to the Tribe, if the land is not otherwise claimed by the State of Iowa, title to such relinquished land should be quieted in the Tribe, as trust land, as we ruled in *Omaha II*.

The district court found that the landowners cannot claim this land under the guise that it is fee-patented land. The court found the fee-patented land was completely washed away by the post-1923 westward movement of the river. We deem this fact not significant. It is the area of land now occupied by the landowners that is important. *See Wilson v. Omaha Indian Tribe*, 442 U.S. at 668, 99 S.Ct. at 2538. This area of land is the same location where allotted lands existed because the Tribe and the United States divested the land from the reservation. Thus, the real significance is that this 400 acre area now claimed by the landowners, acknowledged to involve a separate claim in *Omaha I*, 575 F.2d at 651 n.70, is not trust land. It is not land in which the Tribe can claim that it is entitled to presumptive title by reason of section 194. Thus, as in the controversy involving the State, we deem it important that the Tribe must carry its burden of proof of rightful ownership as to this land. Because section 194 is not applicable to these 400 acres, it is clear that the burden of proof does not rest on the landowners.

The district court reasons, however, that because our mandate in *Omaha II* ordered it to quiet title to the 2200 acres in the Tribe, the law of the case is that the Tribe owned the trust land, and because it is undisputed that the 400 acres of fee-patented land accreted to the trust land by the post-1923 river movement, the Tribe is entitled to judgment. We find this reasoning is in error: The law of the case (*Omaha I and Omaha II*) is that the landowners failed to sustain the burden of proof placed on them pursuant to section 194, and therefore, as to the trust land, the Tribe was awarded presumptive title against those landowners. We did not hold that the Tribe established that the original boundary to the reservation remained unchanged by reason of avulsive river movements from 1879 to 1923, thereby establishing continuing ownership of the Tribe in the trust land. We deem such proof essential for the Tribe and the United States as trustee to establish their claim to the nontrust lands.[9]

[9] It is appropriate to mention here the off-quoted maxim that "in an action to quiet title the plaintiffs must rely upon the strength of their own title and not upon the weakness of that of the defendants." *Dudley v. Meyers*, 422 F.2d 1389, 1394-95 (3d Cir.1970); *see also Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1158 (10th Cir.), *cert. denied*, 439 U.S. 862, 99 S.Ct. 183, 58 L.Ed.2d 171 (1978).

The State and the private landowners have never disputed that the land west of the nonobliterated line (Plate I) was accretion land. Their contention has been that most of this land accreted to the Iowa bank since the reservation lands had been completely eroded away. Both the State of Iowa and the individual owners contend that the Tribe, to meet its burden of proof regarding the tracts of land now in controversy, must prove that the river moved westward over the eastern Barrett Survey land between 1867 and 1923 by avulsion; in other words, they argue the Tribe must establish affirmatively how the river moved during the entire period of time relevant to this lawsuit. As indicated, we agree.

This court's *Omaha II* decision established only that the private defendants had failed to meet their burden of proving how the river moved in the critical time periods. This court recognized that the necessary result of our decision that the landowners had failed to meet their burden was that when the district court entered final judgment, it would ultimately be required, by reason of section 194, to enter a decree quieting title to the trust land in the Tribe and the United States as trustee for the Tribe.[10]

However, this court's finding that the landowners failed to meet their burden of proof, and our recognition of the effect of that finding, did not establish that the Tribe had or would have carried the burden of proof showing that the original trust boundaries had not been altered. The latter holding would be an essential predicate for the Tribe to prove its claim to nontrust lands.

As we have discussed earlier, in regard to the lands claimed by the State, to hold otherwise would in effect give the Tribe the benefit of section 194 with respect to its claims to the State lands and the fee-patented lands, rather than only with respect to its claim to trust lands held by the private defendants. This result would clearly be unsupportable, and

[10] The district court did not enter a judgment quieting title to the trust lands claimed by the private defendants in the Tribe and the United States until it entered a final judgment disposing of all claims of all parties to lands within the original Barrett Survey.

was not intended by our mandate in *Omaha II*. The Tribe cannot do indirectly what it cannot do directly.

We therefore remand this case to allow the district court to determine whether the Tribe has met its burden of proof as defined herein. If it holds that the Tribe failed to meet its burden, it must then determine whether the private defendants and the State of Iowa are entitled to have title to the tracts of land in controversy quieted in them.[11]

We recognize that requiring the Tribe to prove its underlying entitlement to the eastern trust lands to establish its right to the western portion of the Barrett Survey area may seem anomalous in view of *Omaha II*, in which this court has already concluded that title must be quieted in the Tribe to the eastern trust lands. This result is reached, however, as we pointed out above, because of the partial application of section 194 to this case. To hold otherwise would allow the Tribe to apply section 194 against the owners of the land held in fee and against the State of Iowa and would be inconsistent with our earlier mandate.

We also recognize that, because of the passage of time involved, the party having the burden of proof inevitably may face unsuperable barriers, and if the district court finds this to be so, the end result will be that the Tribe will prevail only as to the trust lands formerly in the possession of the private defendants, but not as to the remainder.

The judgment of the district court is reversed and the cause remanded for proceedings consistent with this opinion.
Rehearing and Rehearing En Banc Denied

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is denied as to all issues, with the reservation that the issue raised by Wilson concerning improvements relating to trust lands shall be further briefed.

[11] Defendants also appeal the district court's denial of their request for the value of improvements they made to Barrett Survey land during their possession of it. It is our understanding that the improvements were made solely on the particular tracts of land in controversy here and not on the trust lands with respect to which this court has already indicated must be quieted in the Tribe and the United States. If we are correct, then clearly we cannot rule on this issue in view of our review.

The government and the Tribe are given 30 days in which to file a supplemental brief concerning the petition for rehearing by the panel on the improvement issue and the land owners are given 30 days thereafter in which to file a response. The briefs are to be limited to 20 pages in length.

The motion to modify the panel opinion filed by RGP, Inc., is granted to the extent that the words "that attached to land to the east" found on page 11 on the third line of the quoted sentence are stricken. The additional motion to modify by RGP, Inc. is overruled.

Judge Ross took no part in the consideration of the petition for rehearing en banc.

On Petitions For Rehearing

PER CURIAM.

Both sides have filed petitions for rehearing. Upon full consideration of the petitions and supplemental briefs, we adhere to our original opinion but delete footnote 11. We remand the case to the district court for further proceedings consistent with our modified opinion.

In their briefs on appeal, the landowners had urged that the district court erred in refusing to require the United States to reimburse them for the value of improvements made upon land within the Barrett Survey area during the time for the landowners' possession. In footnote 11, we stated:

> It is our understanding that the improvements were made solely on the particular tracts of land in controversy here, and not on the trust lands with respect to which this court has already indicated title must be quieted in the Tribe and the United States. If we are correct, then clearly we need not rule on this issue in view of our remand.

In their petitions for rehearing, the landowners informed the court that improvements had been made on both trust

and non-trust lands. Therefore, we will consider the improvements issue.

The landowners claimed in the district court that the obligation of the United States to reimburse them for the value of improvements was a condition precedent to its right to have title quieted. The district court rejected the landowners' argument, characterizing their claim as a counterclaim barred by the sovereign immunity of the United States. *See United States* v. *Wilson*, 523 F.Supp. 874, 900-902 (W.D. Iowa 1981).

In a quiet title action where the plaintiff seeks the equitable remedy of a decree quieting title in himself, it is generally accepted that the plaintiff must do equity by reimbursing the defendant for the value of improvements as a condition precedent to his right to relief. *See, e.g., Goode v. Gaines*, 145 U.S. 141, 154-55, 12 S.Ct. 839, 841, 36 L.Ed. 654 (1891) [where owner knew improvements were being constructed and acquiesced to construction]; *McAndrews* v. *Belknap*, 141 F.2d 111, 115 (6th Cir.), *cert. denied*, 323 U.S. 721, 65 S.Ct. 53, 89 L.Ed. 580 (1944); *Pendergrass v. Massengill*, 269 N.C. 364, 152 S.E.2d 657 (N.C.1967); *Scott v. Nygaard*, 241 Or. 347, 405 P.2d 850, 851 (Or.1965); *Simpson v. Bostwick*, 248 Iowa 238, 80 N.W.2d 339, 344 (Iowa 1957).

We see no reason why on the facts of this case the United States should be excused from the application of this equitable doctrine. It is well established that the United States is subject to general principles of equity when seeking an equitable remedy. *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 506, 47 S.Ct. 416, 424, 71 L.Ed. 734 (1927); *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 339, 26 S.Ct. 282, 288, 50 L.Ed. 499 (1906); *United States V. Second National Bank of North Miami*, 502 F.2d 535, 548 (5th Cir.1974); *Sierra Club v. Hickel*, 467 F.2d 1048, 1052 (6th Cir.1972), *cert. denied*, 411 U.S. 920, 93 S.Ct. 1545, 36 L.Ed.2d 313 (1973).

We hold, as did the court in *United States v. Bedford Associates*, 618 F.2d 904, 920 (2d Cir.1980), that "when the government invokes the equity powers of the district court,

that court has the power to withhold the relief requested unless the government performs the conditions precedent to its claim." This principle is further supported by decisions of the Fourth, Fifth and Ninth Circuits. *See United States v. Desert Gold Mining Co.*, 448 F.2d 1230, 1231 (9th Cir.1971); *Ehrlich v. United States*, 252 F.2d 772, 776 (5th Cir. 1958); *Lacy v. United States*, 216 F.2d 223, 225 (5th Cir.1954); *Jacobs v. United States*, 239 F.2d 459, 461-62 (4th Cir.1956), *cert. denied*, 353 U.S. 904, 77 S.Ct. 666, 1 L.Ed. 666(1957); *Martin v. United States*, 240 F.2d 326 (4th Cir.1957), *on remand*, 162 F.Supp. 932 (M.D.N.C.1958) *aff'd in part, rev'd in part*, 270 F.2d 65 (4th Cir.1959).

Because the duty to pay for the value of improvements is an element of the government's own claim, a condition precedent to the right of the United States to recover, we find the doctrine of sovereign immunity is inapplicable. The duty of the United States to pay for the value of improvements, upon a proper showing of entitlement by the landowners, does not arise as a result of finding adverse to it on a counterclaim by the defendants.

We therefore hold that the district court erred in characterizing the landowner's claim as a counterclaim barred by the doctrine of sovereign immunity, and remand for the district court to determine whether, under the applicable principles of law, the United States should be ordered to reimburse the landowners for the value of improvements and if so, in what amounts.[12]

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[12] It is "well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." *Hendershott v. Shipman*, 37 Cal.2d 190, 231 P.2d 481, 483 (Cal.1951). *Cf. Bjornstad v. Fish*, 249 Iowa 269, 87 N.W.2d 1, 8 (Iowa 1957). The United States has heretofore made no claim for recovery of rents and profits. However, the **[copy missing]**

APPENDIX H

Syllabus

WILSON ET AL. v. OMAHA INDIAN TRIBE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 78-160. Argued March 21, 1970—Decided June 20, 1979*

Pursuant to an 1854 treaty, the reservation of the Omaha Indian Tribe (Tribe) was established in the Territory of Nebraska on the west bank of the Missouri River, with the eastern boundary being fixed as the center of the river's main channel. In 1807, a General Land Office survey established that certain land was included in the reservation but since then the river has changed course several times, leaving most of the survey area on the Iowa side of the river, separated from the rest of the reservation. Residents of Iowa ultimately settled on and improved this land, and these non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs. Three federal actions consolidated in District Court, were instituted by respondents, the Tribe and the United States as trustee of the reservation lands, against petitioners, including the State of Iowa and several individuals. Both sides sought to quiet title in their names, respondents arguing that the river's movement had been avulsive and thus did not affect the reservation's boundary, whereas petitioners argued that the disputed land had been formed by gradual accretion and belonged to the Iowa riparian owners. The District Court held that state rather than federal law should be the basis of decision; that 25 U. S. C. § 194—which provides that "[i]n all trials about the right of property in which an Indian may be a party on one side, and a white person the other, the burden of proof shall rest upon the white person, whenever

* Together with No. 78-161, *Iowa et al.* v. *Omaha Indian Tribe et al.*, also on certiorari to the same court.

the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"—was not applicable because the Tribe could not make out a prima facie case that it possessed the disputed land in the past without proving its case on the merits; and that under Nebraska law, the changes in the river had been accretive and thus the petitioners were the owners of the disputed area. The Court of Appeals reversed, ruling that federal rather than state law was applicable; that the Tribe had made a sufficient showing to invoke § 194; and that applying the federal common law of accretion and avulsion to the evidence, the evidence was in equipoise and thus, under § 194, judgment must be entered for the Tribe.

Held:

1. The Court of Appeals was partially correct in ruling that § 194 is applicable here: by its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. In view of the history of § 194 and its purpose of protecting Indians from claims made by the non-Indian squatters on their lands, it applies even when an Indian tribe is the litigant rather than one or more individual Indians. But, while Congress was aware that § 194 would be interpreted to cover artificial entities such as corporations as well as individuals, there is nothing to indicate that Congress intended the word "white person" to include any of the States of the Union. Here, there seems to be no question that the disputed land was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of he 1854 treaty, and this was enough to bring § 194 into play. In view of the purpose of the statute and its use of the term "presumption" which the "white man" must overcome, § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession. Pp. 664-669.

2. The Court of Appeals properly concluded that federal law governs the substantive aspects of the dispute, but it erred in arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Pp. 660-679.

(a) The general rule that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways, *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, does not oust federal law in this litigation. Here, the United States has never yielded title or terminated its interest in the property, and in these circumstances, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677. Pp. 660-671.

(b) However, state law should be borrowed as the federal rule of decision here. There is no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute (the location of the boundary between Iowa and Nebraska having been settled by Compact in 1943). Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. And this is also an area in which the States have substantial interest in having their own law resolve controversies such as these; there is considerable merit in not having the reasonable expectations, under state real property law, of private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Cf. *Board of Comm'rs* v. *United States*, 308 U.S. 343; *Arkansas* v. *Tennessee*, 246 U.S. 158. Pp. 671-676.

(c) Under the construction of the 1943 Compact in *Nebraska* v. *Iowa*, 400 U.S. 117, Nebraska law should be applied in determining whether the changes in the river

that moved the disputed land from Nebraska to Iowa were avulsive or accretive. Pp. 676-678.

575 F.2d 620, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases. BLACKMUN, J., filed a concurring opinion, in which BURGER, C.J., joined, *post*, p. 679.

Edson Smith argued the cause for petitioners in No. 78-160. With him on the briefs were *Robert H. Berkshire, Thomas R. Burke, Lyman L. Larsen, Francis M. Gregory, Jr.*, and *Maurice B. Nieland*. *Bennett Cullison, Jr.*, argued the cause for petitioners in No. 78-161. With him on the brief were *Richard C. Turner*, Attorney General of Iowa, and *James C. Davis*, Assistant Attorney General.

William H. Veeder argued the cause and filed a brief for respondent Omaha Indian Tribe in both cases. *Sara Sun Beale* argued the cause for the United States in both cases.

With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Barnett, Robert L. Klarquist,* and *Edward J. Shawaker.*†

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† Edgar B. Washburn filed a brief for Title Insurance and Trust Co. et al. *as amiei ruriae* urging reversal in both cases.

A brief of *amici curine* urging reversal in No.78-161 was filed for their respective States by *Theodore L. Sendak,* Attorney General of Indiana, *Jane Gootee,* Deputy Attorney General, and *Donald Bogard; William J. Harley,* Attorney General of Alabama; *Aerum Gross,* Attorney General of Alaska; *John A. LaSota, Jr.,* Acting Attorney General of Arizona; *William J. Clinton,* Attorney General of Arkansas; *Carl R. Ajello,* Attorney General of Connecticut; *Richard R. Wier, Jr.,* Attorney General of Delaware; *Robert L.. Shevin,* Attorney General of Florida; *Ronald Y. Amemiya,* Attorney General of Hawaii; *Wayne L. Kidwell,* Attorney General of Idaho; *William J. Scott,* Attorney General of Illinois; *Curt T. Schneider,* Attorney General of Kansas; *Robert F. Stephens,* Attorney General of Kentucky; *William J. Guste, Jr.,* Attorney General of Louisiana; *Joseph E. Brennan,* Attorney General of Maine; *Francis B. Burch,* Attorney General of Maryland; *Francis X. Bellotti,* Attorney General of Massachusetti; *Frank J. Ketty,* Attorney General of Michigan; *A.F. Summer,* Attorney General of Mississippi; *John D. Ashcroft,* Attorney General of Missouri; *Paul L. Douglas,* Attorney General of Nebraska; *Robert List,* Attorney General of Nevada; *Thomas D. Roth,* Attorney General of New Hampshire; *Toney Anaya,* Attorney General of New Mexico; *Louis J. Lefkouitz,* Attorney General of New York; *Rufus L. Edmisten,* Attorney General of North Carolina; *Allen L. Olson,* Attorney General of North Dakota; *William J. Brown,* Attorney General Ohio; *James A. Redden,* Attorney General of Oregon; *Daniel R.McLeod,* Attorney General of South Carolina; *William Janklow,* Attorney General of South Dakota; *William M. Leech,Jr.,* Attorney General of Tennessee; *Robert B. Ilansen,* Attorney General of Utah; *M.Jerome Diamond,* Attorney General of Vermont; *J. Marshall Coleman,* Attorney General of Virginia; *Slade Gorton,* Attorney General of Washington; *Chauncey H. Browning Jr.,* Attorney General of West Virginia; *Bronson C. La Follette,* Attorney General of Wisconsin; *John J. Rooney,* Acting Attorney General, and *Jack D. Palma II,* Senior Assistant Attorney General of Wyoming.

Robert S.Peleyger, Richard B. Collins, and *Arthur Lazarus, Jr.,* filed a brief for the Native American Rights Fund et al. *as amici curiae* urging affirmance in both cases.

John C. Christie,Jr., Charles T. Martin, and Stephen J. Landers filed a brief for the American Land Title Assn. as *amicus curiae* in both cases.

A brief of *amici curiae* was filed in No. 7$-161 for their respective States by *Evelle J. Younger,* Attorney General , *N. Gregory Taylor,*.Assistant Attorney General, and *John Briscoe* and *Bruce S. Flushman,* Deputy Attorneys General, of California; *John L. Will,* Attorney General of Texas; *Mike Greedy,* Attorney General of Montana; *Warren Spannaus,* Attorney General of Minnesota; *Gerald Gornish,* Attorney General of Pennsylvania; and *J.D. MacFarlane,* Attorney General, and *David W. Robbins,* Deputy Attorney General, of Colorado.

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue here is the ownership of a tract of land on the east bank of the Missouri River in Iowa. Respondent Omaha Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands,[1] claims the tract as part of reservation lands created for it under an 1854 treaty. Petitioners, including the State of Iowa and several individuals, argue that past movements of the Missouri River washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners.[2]

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[1] *Heckman v. United States*, 224 U.S. 413 (1912), the Court explained the source and nature of this trust relationship. In the exercise of its plenary authority over Indian affairs, Congress has the power to place restrictions on the alienation of Indian lands. Where it does so, it continues guardianship over Indian lands and "[d]uing the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. . . A transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.*, at 437-438. Accordingly, the United States is entitled to go into court as trustee to enforce Indian land rights. "It [is] not essential that it should have a pecuniary interest in the controversy." *Id. at* 430. See also *Morrison v. Work*, 266 U.S.481, 485 (1925); *Chooie v. Trapp*, 224 U.S. 665, 678 (1912); F. Cohen, Handbook of Federal Indian Law 91-96 (1942).

[2] The State of Iowa claims title to certain lands deeded to it by quit claim and to the bed of the Missouri between the thalweg (see n. 3, infra) and the ordinary high-water mark, any islands formed in that portion of the river, and any abandoned channels. The latter claims are based upon the equal-footing doctrine, *see Pollard's Lessee v. Hogan*, 3 How. 212 (1845), and the 1943 Boundary Compact between Iowa and Nebraska see n. 6, infra.

Two principal issues are presented. First, we are faced with novel questions regarding the interpretation and scope of Rev. Stat. § 2126, as set forth in 25 U.S.C. § 104, a 145-year-old, but seldom used, statute that provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Second, we must decide whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.

I

In 1854, the Omaha Indian Tribe ceded most of its aboriginal lands by treaty to the United States in exchange for money and assistance to enable the Tribe to cultivate its retained lands. Treaty of Mar. 16, 1854, 10 Stat. 1043; see *United States* v. *Omaha Indians*, 253 U. S. 275, 277-278 (1920). The retained lands proved unsatisfactory to the Tribe, and it exercised its option under the treaty to exchange those lands for a tract of 300,000 acres to be designated by the President and acceptable to the Tribe. The Blackbird Hills area, on the west bank of the Missouri, all of which was then part of the Territory of Nebraska, was selected. The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the thalweg.[3] That land, as modified by a subsequent treaty and statutes,[4] has remained the home of the Omaha Indian Tribe.

In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the opposite, Iowa, side of the river, around which the river flowed in an oxbow curve known as Blackbird Bend.[5] Over the next few decades, the

[3] The term is commonplace in boundary disputes between riparian States. See, *e. g.*, *Minnesota* v. *Wisconsin*, 252 U. S. 273, 282 (1920):

"The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. This rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

[4] Treaty of Mar. 6, 1865, 14 Stat. 667; Act of June 22, 1874, 18 Stat. 146, 170; Act of Aug. 7, 1882, 22 Stat. 311; see also Act of Mar. 3, 1885, 23 Stat. 362, 370, as amended by Act of Jan. 7, 1925, ch. 34, 43 Stat. 726.

[5] There is some dispute over whether the Barrett survey actually marked the reservation boundary because several years had passed since the Tribe began occupying the reservation and the Missouri may have changed its course during that period. See *United States* v. *Wilson*, 433 F. Supp. 67, 69, 74 (ND Iowa 1977). This does not appear to be of significance in the case. *Id.*, at 75.

river changed course several times, sometimes moving east, sometimes west.[6] Since 1927, the river has been west of its 1867 position, leaving most of the Barrett survey area on the Iowa side of the river, separated from the rest of the reservation.

As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Four lawsuits followed the seizure, three in federal court and one in state court. The Federal District Court for the Northern District of Iowa consolidated the three federal actions, severed claims to damages and lands outside the Barrett survey area, and issued a temporary injunction that permitted the Tribe to continue possession. The court then tried the case without a jury. At trial, the Government and Tribe argued that the river's movement had been avulsive, and therefore the change in location of the river had not affected the boundary of the reservation. Petitioners argued that the river had gradually eroded the reservation lands on the west bank of the river, and that the disputed land on the east bank, in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.[7] Both sides sought to quiet title in their names.

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[6] In *Nebraska* v. *Iowa*, 143 U. S. 359 (1892), the Court decided a boundary dispute between the States of Nebraska and Iowa caused by the wanderings of the Missouri. "[T]he fickle Missouri River," however, "refused to be bound by the . . . decree," Eriksson, The Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927); and in 1943 Nebraska and Iowa entered into a Compact fixing the boundary between the States independent of the river's location. Congress ratified the Compact in the Act of July 12, 1943, ch. 220, 57 Stat. 404. Since the time of the Compact, the Army Corps of Engineers has been largely successful in taming the river. See *Nebraska* v. *Iowa*, 406 U. S. 117, 119 (1972).

[7] The District Court stated the common-law rule, 433 F. Supp. 57, 62 (1977): "Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm* v. *Stevens*, 128 Neb. 619, 259 N.W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves

The District Court concluded that state rather than federal law should be the basis of decision. *United States v. Wilson*, 433 F. Supp. 57 (1977). The court interpreted the Rules of Decision Act, 28 U.S.C. § 1652, as not requiring the application of federal law in land disputes, even though the United States and an Indian tribe were claimants,[8] unless the Constitution, a treaty, or an Act of Congress specifically supplanted state law. The court found no indication in those sources that federal law was to govern. It then went on to conclude that 25 U.S.C. § 104 was not applicable to the case because it was impossible for the Tribe to make out a prima facie case that it possessed the disputed lands in the past without proving its case on the merits. Thus, § 104 had no significance because it was "inextricably entwined with the merits." 433 F.Supp., at 66.[9]

Applying Nebraska law, [10]which places the burden of proof on the party seeking to quiet title, the court concluded that the key changes in the river had been accretive, and that

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from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. V. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901)."This Court has followed the same principles resolving boundary disputes between States bordering on navigable streams. *Arkansas v. Tennessee*, 246 U. S. 158, 173 (1918); *Missouri v. Nebraska*, 196 U. S. 23, 34-36 (1904); *Nebraska v. Iowa*, 143 U. S., at 360-361, 370.

[8]The District Court relied on *Mason v. United States*, 260 U. S. 545 (1923); *Francis v. Francis*, 203 U.S. 233 (1906); and *Fontenelle v. Omaha Tribe of Nebraska*, 208 F.Supp. 855 (Neb. 1909), aff'd, 430 F. 2d 143 (CAS 1970).

[9]The District Court also suggested that the possessory interest of the Tribe was not of sufficient quality to trigger the burden shifting contemplated by 25 U.S.C. § 194.

[10]The District Court construed the Court's decision in *Nebraska v. Iowa*, 406 U.S. 117 (1972), as requiring the application of Nebraska law with respect to changes in the river that occurred before 1943, the date of the Iowa-Nebraska Compact that permanently fixed the boundary between the States, because the land at issue here was indisputable part of Nebraska before the river changed its course. 433 F. Supp., at 60, and n.2.

the east-bank riparians, the petitioners, were thus the owners of the disputed area. 433 F.Supp. 67 (1977).[11]

The Court of Appeals reversed. 575 F.2d 620 (CAS 1978). It began by ruling that the District Court should have applied federal rather than state law for two distinct reasons. First, the boundary of the reservation was coincidental with an interstate boundary at the time the river moved. Therefore, under *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977), and other cases of this Court, the governing law is federal because

> "[t]he rendering of a decision in a private dispute which would 'press back' an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law." 575 F.2d, at 628.

Second, the Court of Appeals construed our decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677 (1974), as requiring the application of federal law because the Tribe asserted a right to reservation land based directly on the 1854 treaty and therefore arising under and protected by federal law.

The Court of Appeals also ruled that the District Court had erred by refusing to apply 25 U. S. C. § 194. Because the Tribe had proved that the 1854 treaty included the land area within the Barrett survey, it had made a sufficient showing of "previous possession or ownership" to invoke the statute and place the burden of proof on petitioners. Adopting the District Court's construction "would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river." 575 F.2d, at 631.

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[11] Although the District Court hewed closely to Nebraska case law, it also observed that insofar as the relevant definitions of avulsion and accretion were concerned, there was no significant difference between Iowa and Nebraska law, except that under Iowa law accretion was presumed, which was not the case under Nebraska law. Because Nebraska law would not aid the defendants by a presumption of accretion, the Tribe was favored by the application of Nebraska law. The District Court was also of the view that the federal accretion-avulsion law was not substantially different. As we shall see, the Court of Appeals differed with the District Court in this respect.

Reviewing what it perceived to be the federal common law of accretion and avulsion and with no more than passing reference to Nebraska law on the issue, the Court of Appeals concluded that the District Court had based its ruling on a too narrow definition of avulsion.[12] The court then applied the law to the evidence and found that the evidence was in equipoise. Because § 194 placed the burden of proof on the non-Indians, however, the court ruled that judgment must be entered for the Tribe.

We granted separate petitions for certiorari filed by the State of Iowa and its Conservation Commission in No. 78-161 and by the individual petitioners in No. 78-160, but limited to the questions whether 25 U. S. C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases. 439 U.S. 963 (1978).[13]

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[12] The Court of Appeals relied on two cases, *Veatch* v. *White*, 23 F.2d 69 (CA9 1927), and *Uhlhorn* v. *United States Gypsum Co.*, 366 F.2d 211 (CAS 1966), cert. denied, 385 U.S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F.2d 620, 637 (CA8 1978). This definition was broader than the Nebraska rule as understood and applied by the District Court, which the Court of Appeals described as follows: "an avulsion occurs only where a sudden shift in a channel cuts off land 'so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed.'" *Id.*, at 634, quoting 433 F. Supp., at 73. As is evident, the definition employed by the Court of Appeals permits a finding of avulsion even where the river is still largely within its original bed.

[13] In No. 78-161, filed by the State of Iowa and its Conservation Commission, the questions on which certiorari was granted were stated as follows:

"Whether the State of Iowa is 'a white person', and the Omaha Indian Tribe is 'an Indian' within the meaning of 25 U. S. C. § 194.

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."

In No. 78-160, we granted certiorari on the following questions:

"Whether the Eighth Circuit erroneously construed Title 25 U.S. Code § 194 to make it applicable in this case.

"Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretin and avulsion is applicable in this case."

We are in partial, but serious, disagreement with the Court of Appeals, and vacate its judgment.

II

Petitioners challenge on several grounds the Court of Appeals' construction and application of § 194 to these cases.[14] First, they argue that by its plain language the section does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. We think the argument is untenable. The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, 2 Stat. 139, which was one of a series of Acts originating in 1700 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians.[15] Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729. Section 22 of that Act is now 25 U.S.C. § 104, already set out in this opinion. Although the word "Indian" in the second line of § 22 of the 1834 Act replaced the word "Indians" in the 1822 provision, there is no indication that any change in meaning was intended; and none should be implied at this

[14] Of these various arguments, only the single ground relied on by the District Court in refusing to apply § 194 was discussed and rejected by the Court of Appeals. The other grounds for holding § 194 inapplicable to this case were presented by petitioners either in their briefs on the merits before the Court of Appeals or their petition for rehearing before that court after it reversed the District Court.

[15] The background, history, and development of these laws and Acts are explored exhaustively in F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (1962). See also Cohen, *supra* n. 1, at 68-75.

late date, particularly in light of 1 U.S.C. § 1, which provides that unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things."

Even construed as including the plural, however, it is urged that the word "Indians" does not literally include an Indian tribe, and that it is plain from other provisions of the Act that Congress intended to distinguish between Indian tribes and individual Indians. But as we see it, this proves too much. At the time of the enactment of the predecessors of § 194, Indian land ownership was primarily tribal ownership; aboriginal title, a possessory right, was recognized and was extinguishable only by agreement with the tribes with the consent of the United States. *Oneida Indian Nation v. County of Oneida*, 414 U. S., at 660-670. Typically, this was accomplished by treaty between the United States and the tribe, and typically the land reserved or otherwise set aside was held in trust by the United States for the tribe itself. "'Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'" *United States v. Jim*, 409 U. S. 80, 82 (1972), quoting *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307 (1902). It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance, given the historical fact that at the time of the enactment virtually all Indian land was tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978). Furthermore, "'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County*, 426 U. S. 373, 392 (1976), quoting *Alaska Pacific Fisheries, v. United States*, 248 U. S. 78, 80 (1918).

The second argument, presented in its most acute form by the State of Iowa, is that §194 applies only where the Indians' antagonist is an individual white person and has no force at all where the adverse claimant is an artificial entity.[16] We cannot accept this broad submission. The word "person" for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. And in terms of the protective purposes of the Acts of which §104 and its predecessors were a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual. As we said in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 687 (1978), "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."[17] It stands to reason that in re-enacting this provision in the Revised Statutes, now codified in the United States Code, Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals.

It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1041); accord, *United States* v. *Mine Workers*,

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[16] Petitioners cite *United States* v. *Perryman*, 100 U.S. 235 (1880), as support for their position that § 194 must be construed literally to apply only to a "white person," or individual Caucasian. But that case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term "white person" as used in § 16 did not include a Negro. Whether *Perryman* would be followed today is a question we need not decide.

[17] There were two corporate defendants among the parties in the District Court. They filed a separate petition for certiorari, No. 78-162, *RGP, Inc.* v. *Omaha Indian Tribe*, but no action has yet been taken on it. Under our Rules, however, the two corporations are party-respondents in the cases in which we have granted certiorari. Rule 21 (4).

330 U.S. 258, 275 (1047). Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *United States* v. *Knight*, 14 Pet. 301, 315 (1840). There is nevertheless "no hard and fast rule of exclusion," *United States* v. *Cooper Corp., supra*, at 604-605; and much depends on the context, the subject matter, legislative history, and executive interpretation. The legislative history here if uninformative, and executive interpretation is unhelpful with respect to this dormant statute. But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision indentical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . ." 4 Stat. 720. Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.

we discovered anything since its passage or ... with the definition of Indian country now contained ... Criminal Code, 18 U.S.C. § 1151, indicating that Congress intended the words "white person" in § 194 to include any of the original or any of the newly admitted States of the Union. We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 104 when litigating title to the property to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America. It may well be that a State, like other litigants and like the

State of Iowa did in this case, will often bear the burden of proof on various issues in litigating the title to real estate. But § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute.

Petitioners also defend the refusal of the District Court to apply § 194 on the grounds that a precondition to applying it is proof of prior possession or title in the Indians and that this involves the merits of the issue on which this case turns—whether the changes in the river were avulsive or accretive. We think the Court of Appeals had the better view of the statute in this regard. Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular area under dispute. The usual way of describing real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments. There seems to be no question here that the area within the Barrett survey was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854. This was enough, it seems to us, to bring § 194 into play. Of course, that would not foreclose the State of Iowa from offering sufficient evidence to prove its own title or from prevailing on any affirmative defenses it may have.

Petitioners also assert that even if § 194 is operative and even if the Tribe has made out its prima facie case, only the burden of going forward with the evidence, and not the burden of persuasion, is shifted to the State. Therefore they, the petitioners, should prevail if the evidence is in equipoise. The term "burden of proof" may well be an ambiguous term connoting either the burden of going forward with the evidence, the burden of persuasion, or both. But in view of the evident purpose of the statute and its use of the term "presumption" which the "white man" must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its prima facie case of prior title or possession.

III

A

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), this Court held that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways. This was expressive of the general rule with respect to the incidents of federal land grants:

> "'We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*: so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.'" Id., at 377, quoting *Wilcox v. Jackson*, 13 Pet. 498, 517 (1839) (emphasis added by the *Corvallis* Court).

The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal-footing origin of the State's title.

As the Court of Appeals held, however, the general rule recognized by *Corvallis* does not oust federal law in this case. [illegible] not dealing with land titles merely derived from [illegible]nt, but with land with respect to which the United States has never yielded title or terminated its interest. The area within the survey was part of land to which the Omahas had held aboriginal title and which was reserved by the Tribe and designated by the United States as a reservation and the Tribe's permanent home. The United States continues to hold the reservation lands in trust for the Tribe and to recognize the Tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation v. County of Oneida*, 414 U. S., at 677. It is rudimentary that "Indian title is a matter of federal law and can be extinguished only with federal consent" and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is "exclusively the province of federal law." *Id.*, at 670. Insofar as the applicable law is concerned, therefore, the claims of the Omahas are "clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." *Id.*, at 684 (REHNQUIST, J., concurring). This is not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees' incidents of ownership to determination by the applicable state law. The issue here is whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established. That question, under *Oneida*, is a matter for the federal law to decide.[18]

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[18]Petitioners claim that *Oklahoma v. Texas*,, 258 U.S. 574 (1922), mandates the applicability of state rather than federal law in this case. But there the United States issued patents granting former reservation lands. The Court merely held that, absent contrary evidence, when the United States conveyed and completely parted with its territory, even though Indian land, it intended the incidents of the resulting ownership to be determined by state law. This is no more than the general rule that *Oneida* recognized. In the present case, of course, the area at issue was never conveyed away by the United States or by the Tribe and is claimed by the United States and the Tribe to remain as part of the reservation established as the result of the treaty of 1854. Neither do we find that *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), presents a contrary holding. There, the Court refused to construe a federal statute permitting the Secretary of the Interior to grant permission for the opening of highways over Indian land "in accordance with the laws of the state" as prohibiting the establishment of a power line in the highway right-of-way without further federal consent. *Id.*, at 208. As we understand that case, the Court held only that the consent authorized by the federal statute included the uses which such consent would authorize under state law.

B

Although we have determined that federal law ultimately controls the issue in this case, it is still true that "[c]ontroversies . . .governed by federal law, do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal-rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-728 (1979), quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947).[19] The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.

The federal law applied in boundary cases, however, does not neccessarily furnish the appropriate rules to govern this case. No dispute between Iowa and Nebraska as to their common border on or near the Missouri River is involved here. the location of that border on the ground was settled by Compact in 1943 and by further litigation in this Court, *Nebraska v. Iowa*, 406 U.S. 117 (1972). The federal interest in this respect has thus been satisfied, except to the extent that the Compact itself may bear upon a dispute such as this. *United States v. Kimbell Foods, Inc., supra*, advises that at ture we should consider whether there is need for ially uniform body of law to apply in situations comparable to this, whether application of state law would

[19]Compare P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 768 (2d ed. 1973):

"The federal 'command' to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should 'govern' a given question, state law furnishes an appropriate and convenient measure of the content of this federal law."

frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law. An application of these factors suggests to us that state law should be borrowed as the federal rule of decision here.

First, we perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have ben avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *United States v. Kimbell Foods, Inc., supra, at 730.*

Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interest. On some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is as likely on other occasions that the tribe will stand to gain. The same would be the case under a federal rule, including the rule that the Court of Appeals announced in this case. The United States fears a hostile and unfavorable treatment at the hands of state law, but, as we have said, the legal issues are federal and the federal courts will have jurisdiction to hear them. *Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).* Adequate means are thus available to insure fair treatment of tribal and federal interests.

This is also an area in which the States have substantial interest in having their own law resolve controversies such

as these. Private landowners rely on state real property law when purchasing real property, whether riparian land or not. There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer to the avulsive-accretion riddle in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants. Indeed, in this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals.

We have borrowed state law in Indian cases before. In *Board of Comm'rs* v. *United States*, 308 U.S. 343 (1939), the question was what law, federal or state, would apply in a claim to recover taxes improperly levied by a political subdivision of a State upon Indians' trust lands. The Court observed that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas." *Id.*, at 349-350. The Court, nevertheless, elected to adopt state law as the federal rule of decision. There was no reason in the circumstances of the case for the beneficiaries of federal rights to have a privileged position over other aggrieved taxpayers, and "[t]o respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."[20]

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[20] See *Board of Comm'rs* v. *United States*, 308 U.S., at 351-352:

"Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone* v. *White*, 301 U. S. 532, 534, Congress has left us free to take into account appropriate consideration of 'public convenience.' Cf. *Virginian Ry. Co.* v. *Federation*, 300 U.S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected

The importance of attending to state law, once an interstate boundary has been determined, is underlined by *Arkansas* v. *Tennessee*, 246 U.S. 158 (1918). In that case, because the disputed boundary between Arkansas and Tennessee had been determined, the question of title to riparian land and to the river bottom was a matter to be determined by local law:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the State to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adajacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located." *Id.*, at 175-176.

Likewise, in the present case, the Compact of 1943 settled the location of the interstate boundary, within and without the river; and the question of land ownership within or adjacent to the river is best settled by reference to local law even where Indian trust land, a creature of the federal law, is involved.

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by their local laws. See, e.g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown* v. *United States*, 263 U.S. 78; *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 209. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."

C

The passage quoted above from *Arkansas v. Tennessee* was quoted with approval in *Nebraska v. Iowa*, 406 U.S. 117, 126-127 (1972), where the central question was the interpretation of the Interstate Compact determining the location of the entire border between Nebraska and Iowa.[21] Our opinion in *Nebraska v. Iowa* is also instructive with respect to which state law, Iowa or Nebraska, the federal court should refer to in determining the federal standard applicable to this case.

Under § 2 of the Compact, each State ceded to the other and relinquished jurisdiction over all lands within the Compact boundary of the other State. Under § 3, "Titles, mortgages, and other liens" affecting such lands that are "good in" the coding State "shall be good in" the other State.[22]

Thus, ceded lands east of the Compact line came under Iowa jurisdiction; but Iowa was obligated to respect title to any ceded land east of the new boundary if that title was "good in" Nebraska. Accepting the Special Master's recommendations in this respect, the Court ruled that one claiming a Nebraska title to land east of the Compact line need show only "good title" under Nebraska law and need not also prove either the location of the original boundary between the two States or that the land at issue was on the Nebraska side of that original boundary. The Court further ruled, in agreement with the Special Master, that in litigating with private claimants seeking to prove good Nebraska title to land east of the

[21] The Special Master in that case observed that, although it would be difficult, the location of the agreed-upon boundary in the Compact could be determined with reasonable accuracy. Report of Special Master in *Nebraska v. Iowa*, O. T. 1964, No. 17 Orig., p. 50.

[22] See 1943 Iowa Acts, ch. 306, as ratified by Act of July 12, 1943, ch. 220, 57 Stat. 494:

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"Sec 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

Compact line, the State of Iowa was disentitled to rely on certain doctrines of Iowa common law bearing an riparian land ownership.[23]

In this case, the District Court ruled that even though the United States and an Indian tribe rather than private parties were plaintiffs, title to the Barrett survey land, which was once in Nebraska but is now unquestionably in Iowa, should be governed by Nebraska law in accordance with the terms of the Compact. Proceeding to adjudicate the case in accordance with Nebraska law, the District Judge found that the Tribe and the Government, respondents here, had failed to prove that the Blackbird Bend area had been separated from the rest of the reservation by avulsive changes in the Missouri River and that the defendants, petitioners here, without the aid of any presumption of accretion available under Iowa law if applicable, had instead proved that the river changes had been by accretion. In the course of arriving at this conclusion, the District Court, relying on Nebraska cases, rejected the Government's definition of avulsion, later embraced by the Court of Appeals, as contrary to the common law of Nebraska. The defendants, petitioners here, having carried the burden of proving their good title to the land at issue, were entitled to a decree quieting title in them.

Although we have already held that the District Court erred in concluding that determination of titles to reservations lands is not a matter for the federal law, we have also indicated that the federal law should incorporate the applicable state property law to resolve the dispute. Therefore, it seems to us that the District Court reached the correct result in ruling that under the construction of the Compact in *Nebraska v. Iowa*, Nebraska law should be applied in determining whether the changes in the river that moved the Blackbird Bend area from Nebraska to Iowa had been avulsive or accretive. It

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[23] Under this ruling, Iowa was disentitled, either as plaintiff or defendant, from invoking its presumption that changes in the Missouri had been accretive rather than avulsive, and could not rely on its rule that no person can claim adversely against the sovereign State of Iowa. Thus, a title based on adverse possession good under Nebraska law would be good in Iowa. Report of Special Master, *supra*, at 174-175.

should also be noted that the District Court, although wrong in wholly rejecting the applicability of § 194, concluded as a matter of fact and law that the defendants, petitioners here, had carried the burden of persuasion normally incumbent upon a plaintiff in a quiet-title action, and had proved by a preponderance of the evidence that the reservation lands had eroded and had accreted to the Iowa shoreline. Apparently for this reason, the trial judge observed at the end of his memorandum opinion that were he wrong in refusing to apply § 194, his findings and conclusions "would not be altered by any different allocation of the burden of persuasion." 433 F. Supp., at 67.

IV

In sum, the Court of Appeals was partially correct in ruling that § 194 was applicable in this case. By its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. We also agree with the Court of Appeals' conclusion that federal law governed the substantive aspects of the dispute, but find it in error for arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Instead, the court should have incorporated the law of the State that otherwise would have been applicable which, as we have said, is the law of Nebraska. Of course, because of it view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case. These [illegible] be performed, and we vacate the Court of [illegible]gment and remand the case for futher proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, but I write briefly to add a comment about my views as to the scope of 25 U.S.C. § 194.

Section 194 applies to a property dispute between an Indian and a "white person." The property dispute here is between Indians, on the one hand, and on the other, nine individuals, two corporations, and the State of Iowa. See 575 F.2d 620, 622 (CA8 1978). The Court holds that "white person" includes an artificial entity and thus that § 194 applies in the dispute between the Omahas and the two corporate petitioners. *Ante*, at 666-667. Contrariwise, the Court holds that "white person" does not include a sovereign State, and thus that § 194 does not apply in the dispute between the Omahas and petitioner State of Iowa. *Ante*, at 667-668, 678. The Court, however, does not expressly discuss § 194's applicability to the nine individual claimants.

Since the Court nevertheless holds that "§ 194 applies to the private petitioners" without exception, *ante*, at 678, it must be proceeding on one of two assumptions. The Court could assume, first, that all nine individual petitioners are Caucasians, and hence each literally is a "white person" under § 194. There is no evidence in the record, however, as to the race of these individuals. See Brief for Petitioners in No. 78-160, p.30; Brief for United States 32 n. 25; Tr. of Oral Arg. 13. Since the burden of proving the factual predicate for § 194's applicability presumably rests on the Indians who seek to invoke it, the Court, in holding § 194 applicable to the individual petitioners here, could not properly rely on this first possible assumption.

The Court could assume, second, that "white person" in § 104 refers, not to a Caucasian, but to a "non-Indian" individual. On this assumption, the race of the individual petitioners (so long as they are not Indians) would be irrelevant in determining § 194's applicability. That this is in fact the assumption the Court makes is suggested by its decision to ignore the adjective "white" in holding each of the corporate petitioners to be a "white person" and by its refusal to follow *United States v. Perryman*, 100 U.S. 235 (1880), where it was held that "white person," as used in another section of the Non-Intercourse Act, did not include a Negro. *Ante*, at 666 n. 16.

The Court seems to hold implicitly, therefore, that "white person" in § 194 includes any "non-Indian" individual. I would prefer to make this holding explicit. In my view, any other construction of § 194 would raise serious constitutional questions. To construe § 194 as applicable to disputes between Indians and Caucasians, but not to disputes between Indians and black or oriental individuals, would create an irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee. To avoid this result, § 194's reference to a "white person" must be read to mean any "non-Indian" individual or entity, and I so interpret the Court's holding today. To the extent that *Perryman* is inconsistent with this reading, I must regard that case as overruled *sub silentio*.

APPENDIX I

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH the UNITED STATES (10 Stat. 1043). Organized pursuant to the Act of 6/18/34 (48 Stat. 984; 25 USC 476) as amended, Appellant,

v.

Roy Tibbals WILSON, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, the State of Iowa, Darrell L. Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa, Appellees.

UNITED STATES of America,
Appellant

v.

Roy Tibbals WILSON, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company and the State of Iowa, Appellees,

Nos. 77-1384 and 77-1387.

**United States Court of Appeals,
Eighth Circuit.**

Submitted June 13, 1977.

Decided April 11, 1978.

**Rehearing and Rehearing En Banc
Denied May 2, 1978.**

William H. Veeder, Washington, D.C., for Omaha Indian Tribe (appellant).

James W. Moorman, Acting Asst. Atty. Gen., Edward J. Shawaker (argued) and Edmund B. Clark, Attys., Washington, D.C., Dept. of Justice, on brief, for United States (appellant).

Edson Smith (on brief), of Swarr, May, Smith & Andersen, Omaha, Neb., and Peter J. Peters (on brief), of Peters, Campbell & Pearson, Council Bluffs, Iowa, argued; Robert

H. Berkshire, Omaha, Neb., Thomas R. Burke and Lyman L. Larsen, Omaha, Neb., Bennett Cullison, Jr., Harlan, Iowa, Lowell C. Kindig, Sioux City, Iowa, and Richard C. Turner, Atty. Gen., and James C. Davis, Asst. Atty. Gen., Des Moines, Iowa, on brief, for appellees.

Before LAY, STEPHENSON and HENLEY, Circuit Judges.

LAY, Circuit Judge.

On March 16, 1854, the Omaha Indian Tribe entered into a treaty with the United States in which certain lands, including 2,900 acres of land located in the then Territory of Nebraska in an area known as Blackbird Bend, were reserved by the Tribe as part of an agreement which ceded to the United States all other land west of the "centre of the main channel of said Missouri river . . ."[1] Act of March 16, 1854, Art. 1,10 Stat. 1043. At the time the Omaha Indian Reservation was established the reserved land within Blackbird Bend was situated on the west side of the Missouri River. However, by 1923 the river had moved more than two miles to the west of the original boundary line so that much of the land contained within the original Blackbird Bend area was situated on the east side of the river. The defendants assert that early movements of the Missouri River had completely washed away the Reservation lands and that the land now existing within the former boundaries of the Barrett Survey is soil which has accreted to the Iowa riparian land.

[1] The treaty was entered into by George W. Manypenny, Commissioner on the part of the United States, ratified by the United States Senate and signed by President Franklin Pierce on the 21st day of June 1854. "Marks" indicating agreement of the Tribe were made by the then Chiefs of the Omaha Indian Tribe: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-mah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Tah-wah-gah-ha, or Village Maker, Wah-no-ke-ga, or Noise; and So-da-nah-ze, or Yellow Smoke. In addition to providing for the cession of land to the United States and defining the limits of the Reservation's boundary, the Omaha Tribe agreed to vacate all other lands acknowledging their complete dependence on the government of the United States. Art. 10. The United States agreed to pay certain monies over the ensuing 40 years and to aid the Tribe by various affirmative means to "advance them in civilization." Art. 4. The other articles of the treaty include several specific covenants and pledges exchanged between the United States and the Tribe. *See* Act of March 16, 1854, 10 Stat. 1043.

As a result of this dispute the United States and the Omaha Indian Tribe, a duly organized corporate body, in 1975 sought equitable relief asserting their right to the 2,900 acres of land not situated in Monona County, Iowa. The United States throughout this litigation acts in the capacity of trustee of the Tribe's reservation lands.[2] The defendants claim title to the land in dispute and seek by way of counterclaims to quiet title in their names. The defendants are Roy Tibbals Wilson, Harold Jackson, a tenant of Roy Tibbals Wilson, Harold Sorenson, Luea Sorenson, Darrell L. Sorenson, Harold M. Sorenson, Charles Lakin, Florence Lakin, the State of Iowa and the State Conservation Commission, R.G.P. Incorporated, Travelers Insurance Company, mortgagee of R.G.P., and Otis Peterson, a tenant of R.G.P.

From at least the 1940's until April 2, 1975, the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute. After April 2, 1975, with the assistance of the Bureau of Indian Affairs and with the approval of the United States, the Omaha Indian Tribe seized possession of the land and is presently farming it. After the Tribe had seized the land the United States District Court, the Honorable Edward J. McManus presiding, granted a preliminary injunction permitting occupancy of the land by the Tribe during the pendency of this litigation, but requiring certain accounting procedures pertaining to the crops grown on the land be instituted. Following trial and entry of judgment in favor of the defendants, this court on May 13, 1977, entered a stay pending appeal maintaining in effect the terms of the district court's preliminary injunction.

After a lengthy trial the district court, the Honorable Andrew W. Bogue, presiding, found that the boundary of the Omaha Indian Reservation had shifted with the movements of the Missouri River and quieted title in the defendant

[2] While Indians have the right of use and occupancy to tribal lands, the United States holds the land as a trustee for the benefit of the Indians. *See Morrison* v. *Work*, 266 U.S. 481, 485, 45 S.Ct. 149, 69 L.Ed.394 (1925). *See also Choate* v. *Trapp*, 224 U.S. 665, 678, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *United States* v. *Rickert*, 188 U.S. 432, 442-43, 23 S.Ct. 478, 47 L.Ed. 532 (1903). F. Cohen, Handbook of Federal Indian Law 94-95 (AMS Press ed. 1972).

landowners. The court found that the plantiffs had failed to prove that the river movements were controlled by the doctrine of avulsion and held that the river had changed by reason of the erosion of reservation land and accretion to Iowa riparian land. *United States* v. *Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977). The district court supplemented its findings on the merits with an opinion resolving choice of law problems, setting forth principles governing avulsion and accretion and discussing the allocation of the brden of proof. *United States* v. *Wilson*, 433 F.Supp.57 (N.D.Iowa 1977).

1. ***The Issues.***

This dispute centers on the ownership of land in an area known as Blackbird Bend which was surveyed in 1867 by T.H. Barrett[3] on behalf of the General Land Office of the United States.[4] The basic issue on appeal is whether the boundary of the reservation remained at its 1854 location despite the significant changes in the location of the Missouri River since that time.

We vacate the judgment of the district court rendered in favor of the defendants; we find the trial court erroneously placed the burden of proof on the Omaha Indian Tribe and failed to properly apply governing principlies of federal law

[3] Barrett's survey established the meander line for the Nebraska shore of the Missouri River.

[4] Claims to land outside of an area described by the 1867 Barrett Survey were severed from the present case. The trial court explained the severance as follows:

Approximately 8000 acres of land claimed by the Omaha Indian Tribe in C75-4067 and all issues of damages were severed. The severance of the Barrett Survey Area from the other claims of the Omaha Indian Tribe was necessary because the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable. This left the 2900 acres within the Barrett Survey as the subject matter of this trial since the dispute over that land is common to all three lawsuits. *United States* v. *Wilson*, 433 F.Supp. 67, 69 (N.D.Iowa 1977).

relating to avulsion and accretion; we hold the evidence is too speculative and uncertain to show that the reservation boundary shifted by reason of accretion and that the defendants have failed to overcome the presumptive right of possession and title in the Tribe to the reservation lands.

II. *The Historical Facts.*

The Treaty of 1854 established the eastern boundary of the reserved land at the center of the main channel of the Missouri River.[5] Because the exact location of the thalweg[6]

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[5] Article One of the treaty provided in part:

> The Omaha Indians cede to the United States all their lands west of the Missouri river, and south of a line drawn due west from a point in the centre of the main channel of said Missouri river due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however,* that if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them.

Act of March 16, 1854, Art. 1, 10 Stat. 1043.

[6] The word thalweg is derived from the German language and is said to be

> (t)he channel continuously used for navigation. In other words, the thalweg is not a boundary line but in fact a boundary area, because the channel of a river is never a precise line. De la Pradelle emphasizes this special character in one of his definitions: the thalweg is that specific area in the river which is in practice the variable route followed by boatmen on their way down the river.

Bouchez, *The Fixing of Boundaries in International Boundary Rivers,* 12 Int'l & Comp.L.Q. 789, 793 (1963) (footnote omitted).

> The United States Supreme Court adopted the thalweg principle as the standard rule for establishing interstate boundaries in *Iowa v. Illinois,* 147 U.S. 1, 10, 13 S.Ct. 239, 37 L.Ed. 55 (1893). Later, in *Minnesota v. Wisconsin,* 252 U.S. 273, 40 S.Ct. 313, 64 L.Ed. 558 (1920), the Court explained the purpose of the rule.
>
> > The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely

of the Missouri River could not now be established and since the Barrett Survey was conducted only a few years after the reservation was established, the trail court accepted the Barrett Survey as representing the original location of the reservation's boundary.[7] *See* Plate I.

From 1854 until sometime near 1875 it is generally accepted that the Missouri River moved east until it reached the Iowa easterly high bank.[8] The evidence shows the river was approximately 800 feet wide at that time. The first controversial movement of the river in this case occurred after it reached its easterly position against the high bank.[9] By

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because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

Id. at 282, 40 S.Ct. at 319.

See also New Jersey v. Delaware, 291 U.S. 361, 381, 54 S.Ct. 407, 78 L.Ed. 847 (1934); *Louisiana v. Mississippi* 202 U.S. 1, 49, 26 S.Ct. 408, 50 L.Ed. 913 (1906); *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211, 215 (8th Cir. 1966); *Whiteside v. Norton*, 205 F. 5, 9 (8th Cir. 1913); 1 C. Hyde, International Law § 138 (2d rev. ed. 1951); 8 Op. Att'y Gen. 175 (1856).

[7] Although the exact words used in acts of Congress defining the boundaries of a state may vary (for example, "middle of the river," "middle of the main channel," "mid-channel" or "middle thread of the channel") the Supreme Court has presumed that since "[i]t is the free navigation of the river . . . that States demand shall be secured to them", *Iowa v. Illinois, supra*, 147 U.S. at 13, 13 S.Ct. at 243, *quoting Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N.E. 439 (1888), in the absence of a contrary agreement, the middle of the main channel, the thalweg, establishes the interstate boundary. *Iowa v. Illinois, supra*, 147 U.S. at 13, 13 S.Ct. 239.

[8] There is no disagreement as to the Tribe's description that:

> The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.
>
> It commences at a point on the Easterly High Bank located approximately 2,200 feet southwesterly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P.M., continuing down said Easterly High Bank a distance of approximately 3½ miles to a point on the Easterly High Bank approximately 4,900 feet northwesterly of the common corner of Sections 4, 5, 8, and 9, T. 83 N., R. 46 W. of the 5th P.M.

[9] The exact time at which the river reached and then left the easterly high bank is not certain. All parties agree the 1875 atlas map, *see generally* Plate I, showing the river against the high bank could have been prepared sometime before 1875.

1879 a survey conducted by the Missouri River Commission showed the river, at high flood stage, to be almost 10,000 feet wide covering as much as two-thirds of the Barrett Survey meander lobe. The thalweg had shifted from against the easterly high bank to a point nearly 6,000 feet to the west. *See* Plate II.

After 1879 the river moved to the northeast until it reached the Iowa northerly high bank[10] sometime near 1912. *See* Plate III. The second dispute between the parties involved the movement of the river away from its northerly high bank location to a location significantly to the south in the period between about 1912 and 1923. *See* Plate IV. By 1923 almost the entire peninsula described by the Barrett Survey had been cut off by the river's movement.

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[10] The Tribe describes the northerly high bank as

> "a natural monument demarking the furthest migration northward of the Missouri River from the northern boundary of the 2900 acres as surveyed by Barrett in 1967. . .
>
> The course of the Northerly High Bank is described as follows: The Iowa Northerly High Bank runs southeasterly through SE^2 of Section 13, T. 84 N., R. 47 W. and continuing through the NE^4 of Section 24, T. 84 N., R. 47 W., then easterly through the NW^4 and the N^2NE^4 of Section 19, T. 84 N., R. 46 W., thence southerly approximately 2,000 feet through the E^2NE^4 of Section 29, T. 84 N., R. 46 W., terminating at the point of intersection of the Iowa Easterly High Bank. . . .

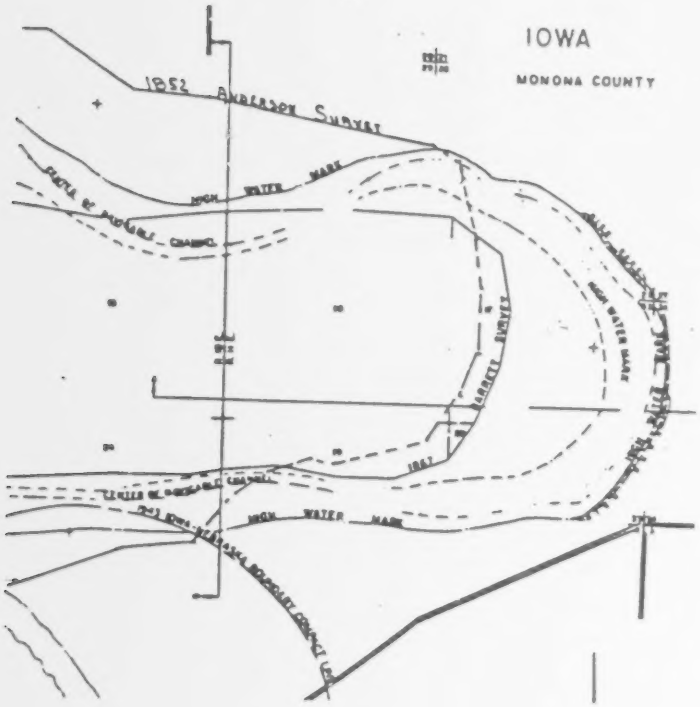

PLATE I.
Sketch of river's position in approximately 1875 showing 1852 Anderson and 1867 Barrett Survey meander lines.

[See following illustration.]

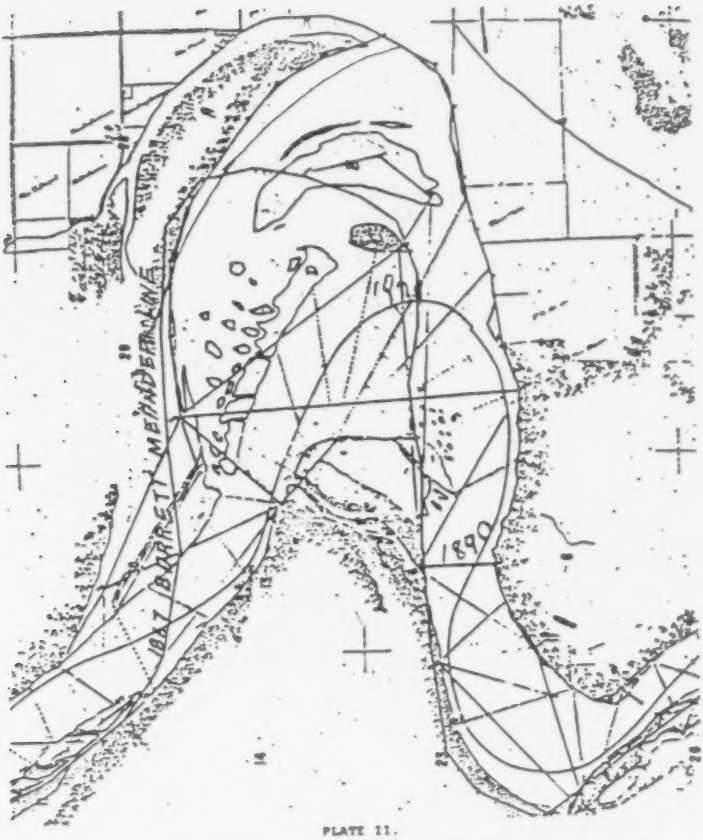

PLATE II.

1879 Missouri River Commission survey map.

[See following illustration.]

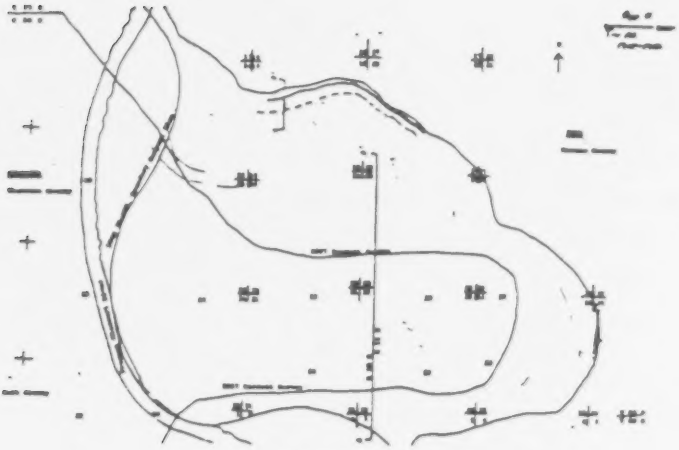

PLATE III.

Sketch of river against the northerly high bank.

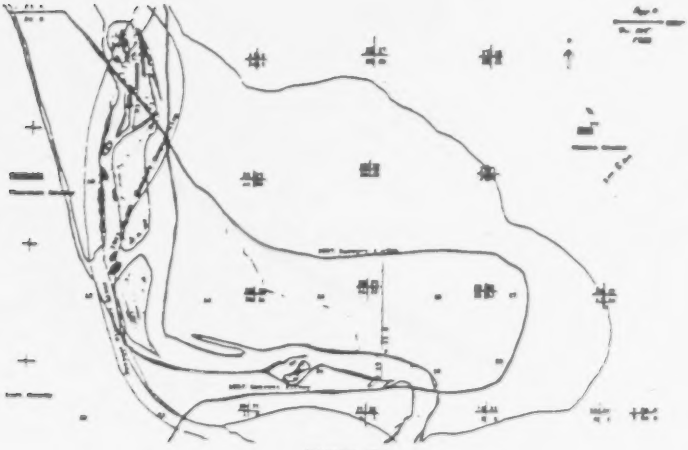

PLATE IV.

1923 Corps of Engineers map.

III. *Choice of Law.*

At trial the Tribe and the government asserted that federal law should control while the defendants contended that Iowa law should have been applied. The district court, however, applied Nebraska law in evaluating the facts of the case. On appeal the Tribe and the government renew their assertion that federal law should be applied in the resolution of this case. We hold that the governing principles of federal law vary significantly with the trial court's construction of state law and that the court erred in failing to apply that federal law.

A. *Interstate Boundaries.*

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), the Supreme Court reaffirmed the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways. *Id.* at 378-79, 97 S.Ct. 582. However, the Court recognized an important caveat to this rule:

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

Id. at 375, 97 S.Ct. at 589.[11]

As the Supreme Court noted in *Arkansas v. Tennessee*, 246 U.S. 158, 176, 38 S.Ct. 301, 306, 62 L.Ed. 638 (1918):

> [T]hese dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

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[11] *See also Illinois v. City of Milwaukee*, 406 U.S. 91, 105-06, 82 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *Arkansas v. Texas*, 346 U.S. 368, 372-73, 74 S.Ct. 109, 98 L.Ed. 80 (1953) (Jackson J., dissenting); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938); Note, *The Federal Common Law*, 82 Harv.L.Rev. 1512, 1520 (1969).

Cf. St. Louis v. Rutz, 138 U.S. 226, 250, 11 S.Ct. 337, 34 L.Ed. 941 (1891).

Federal common law is applicable even where only a single state is involved in a controversy with a private party, *see Cissna v. Tennessee*, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 (1918), or where only private parties are involved, see *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938); *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 n. 8 (4th Cir. 1976); *Port of Portland v. An Island In Columbia River*, 479 F.2d 549 (9th Cir. 1973); *Sherrill v. McShan*, 356 F.2d 607 (9th Cir. 1966); *Iselin v. La Coste*, 139 F.2d 887 (5th Cir.), *cert. denied*, 321 U.S. 790, 64 S.Ct. 791, 88 L.Ed. 1080 (1944), as long as the interests of more than one state are sufficiently implicated in the potential outcome. The rendering of a decision in a private dispute which would "press back" an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law.

In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law since both boundaries were located at the thalweg of the Missouri River. However, in 1943 Iowa and Nebraska entered into a compact under which the boundary between the states was permanently established at the middle of the main channel of the Missouri River in essentially its position in 1943. Iowa-Nebraska Boundary Compact, Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306; 1943 Nebraska Laws ch. 130. Ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943).[12] To apply the compact it is nevertheless necessary to establish

[12] The compact provided for the cession of land previously lying within the boundaries of one state to the state within which it was located following the establishment of the permanent boundary. Titles, mortgages, and other liens good in the ceding state must be recognized as valid in the receiving state, Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306, §§ 2-3; 1943 Nebraska Laws ch. 130, §§ 2-3. *See also Nebraska v. Iowa*, 406 U.S. 117, 122, 92 S.Ct. 1379, 31 L.Ed.2d 733 (1972).

title good in one state or the other as of 1943. Iowa-Nebraska Boundary Compact § 3. Good title in a state prior to 1943 in turn depends upon the location of the thalweg of the Missouri River, a determination which would have been controlled by federal law. Thus, in this case, since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied.

B. ***Indian Law.***

An equally compelling reason for applying federal law is the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated. The trial court rejected this position under the authority of *Fotenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970), where the Nebraska federal district court applied Nebraska law in an accretion-avulsion dispute between the Omaha Indian Tribe and individual Indians who traced their title back through individual patents issued to their predecessors by the United States.[13] Instead, the trial court, finding no federal regulatory program involved[14] and no specific act of Congress which displaced state law, reasoned, *citing Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956), and *Francis v. Francis*, 203 U.S. 233, 27 S.Ct.129, 51 L.Ed. 165 (1906), that local law governed title disputes between the Indian tribe and private claimants. 433 F.Supp. at 61.

It has long been held that the rights and incidents of ownership attaching to grants made by the United States of public lands bounded on streams or other bodies of water, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. The fact that a conveyance disposes of tribal lands of Indians under guardi-

[13]Although this court affirmed the district court, the issue of state vis-a-vis federal law was not discussed. This court cited only federal authorities relating to the accretion-avulsion issue.

[14]*See generally United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973).

anship does not alter the rule. *See Oklahoma v. Texas*, 258 U.S. 574, 595, 42 S.Ct. 406, 66 L.Ed. 771 (1922). The *Fontenelle* decision and the other cases cited by the trial court fall within this settled doctrine. In *Packer v. Bird*, 137 U.S. 661, 669, 11 S.Ct. 210, 212, 34 L.Ed. 819 (1891), the Court observed:

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.

The present dispute is not related to incidents or rights flowing from a conveyance of public land or related to a patent grant of Indian allotment lands. Instead, the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself, as it was originally contained in the Barrett Survey and established by the Treaty of 1854. The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands.[15] Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished. *See* discussion of 25 U.S.C. § 194 *infra*. Under the circumstances the Supreme Court's observation in *Oneida Indian Nation v. County of*

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[15]In the early case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 356-57, 8 L.Ed. 483 (1832), Chief Justice observed:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts ... manifestly consider the serveral Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boudaries, which is not only acknowledged, but guarantied by the United States.

Oneida, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974), is applicable here:

> In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

State law dealing with riparian rights cannot unilaterally extinguish or deprive Indians of their tribal lands. The land area involved in this appeal relates solely to the original reservation land. Therefore, germane here is the Supreme Court's statement in *Oneida* that: "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674, 94 S.Ct. at 781.[16] Riparian ownership rights have been

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[16] The special concern for preserving Indian land in the Indians is evidenced in the immunity of trust lands from the traditional restrictions on recovering land such as statutes of limitation, laches, and adverse possession. As the Fourth Circuit Court of Appeals early observed:

> The determinative fact is that the federal government has assumed towards them [the Eastern Band of Cherokee Indians] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent. Indeed, a statute of the United States expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease or other conveyance, except by treaty or convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty. R.S. § 2116, 25 U.S.C.A. § 177.

United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938) (citations omitted). *See also United States v. Candelaria*, 271 U.S. 432,

specifically held to be controlled by federal law where trust land is involved.

> The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2) upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

Confederated Salish & Kootenai Tribes v. Namen, 380 F.Supp. 452, 461 (D.Mont.1974), *aff'd*, 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929, 97 S.Ct. 336, 50 L.Ed.2d 300 (1976) (citation omitted).[17]

See also United States v. Finch, 548 F.2d 822, 832-33 (9th Cir. 1976), *vacanted on other grounds*, 433 U.S. 676, 97 S. Ct. 2909, 53 L. Ed. 2d 1048 (1977). *Cf. Bauman v. Choctaw-Chickasaw Nations*, 333 F.2d 785, 787-89 (10th Cir. 1964), *cert. denied*, 379 U.S. 965, 85 S. Ct. 658, 13 L.Ed.2d 559 (1965).

Finding the land in dispute affects an interstate boundary at the time the controversial movements occurred, and because the Tribe's right asserted to Indian trust land arises

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440-42, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *United States v. Minnesota*, 270 U.S. 181, 196, 46 S.Ct. 298, 70 L.Ed. 539 (1926); *United States v. Schwartz*, 460 F.2d 1365, 1371-72 (7th Cir. 1972); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780, 784-85 (D.Conn.1976).

[17] *See also United States v. Forness*, 125 F.2d 928, 932 (2d. Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942); *Schaghticoke Tribe of Indians v. Kent School Corp.*, *supra* at 783-84; *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F.Supp. 798, 804 (D.R.I.1976).

under federal law, we hold that the governing law is federal law.

IV. *Burden of Proof.*

Section 194 of Title 25 of the United States Code[18] provides:

> *Trial of right of property; burden of proof*
>
> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

(Emphasis added).

The trial court reasoned that application of the statute to accretion or avulsion cases would be "unreasonable and circuitous" and "inextricably entwined with the merits." The court's analysis was apparently based on the idea that to apply § 194 would require the court to presume that the land originally occupied by the Indians within the Barrett Survey is exactly the same land in place today. To do so, the court believed, would be to decide the merits and compel it to

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[18] The defendants question the constitutionality of 25 U.S.C. § 194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974), that:

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.
>
> (Citations omitted).

See also Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 479-80, 86 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 843, 47 L.Ed.2d 106 (1976). *Cf. McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash 1965), *aff'd*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966).

decide that the same land remained by reason of avulsive movements of the river. On the other hand, the court reasoned, if the land had washed away and new land had accreted to the Iowa riparian owners, the Indians had never "possessed" the new land and it would not be proper to apply the statute.

We reject this reasoning.

Application of § 194 is not a self-answering inquiry to the issues at hand.[19] To hold otherwise, one must presume that the reservation land has in fact been destroyed. Furthermore, the trial court's reasoning would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river. Thus, under the trial court's rationale a party making claim to Indian land could defeat the congressional mandate by mere allegation without proof. We cannot accept the proposition that congressional policy can be so easily thwarted.

It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows "previous possession or ownership" and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants. Contrary to the trial court's statement, applying the statutory burden of proof in this case does not decide the merits of the case since the fundamental issue still remains: Was there an alteration in the original boundary by reason of the marked movement of the Missouri River in the time periods involved? The defendants must bear the burden of proof that the boundary has been changed.

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[19] Two cases have cited § 194, *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938), and *Felix v. Patrick*, 36 F. 457 (C.C.D.Neb. 1888), *aff'd* 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719 (1892), but neither case expounds upon the effect the section should be given.

The early Indian Non-Intercourse Acts provided special treatment to Indian nations as the frontier was being settled. Section 194 was one of many special protective measures included in the Acts. The legislative history of the Act of June 30, 1834, 4 Stat. 729 (1846), of which § 194 was a part, clearly evidences a protectionist policy with regard to Indians.[20]

> The time has been when conciliation was sought; but the time is now passed when the fear of Indian hostility should be a leading feature of our Indian intercourse. Our relation to them is now that of the strong to the weak, and demands at our hands a more liebral policy, as well directed to promote their welfare as our political interests.

H.R. Rep. No. 474, 23d Cong., 1st Sess. 10-11 (1834).

The practice of safeguarding Indians in special areas of legislation continues today. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed2d 300 (1975); *Antoine v. Washington*, 420, U.S. 194, 199-200, 95 S.Ct. 944, 43 L.Ed.2d 129 $(1975).

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[20]Section 22 of the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, upon which 25 U.S.C. § 194 is based, is derived from a similar provision in an 1822 non-intercourse act. See Act of May 6, 1822, § 5.3 Stat. 683. A 1924 Attorney General's opinion uses § 194 as an example of a long established practice of safeguarding Indian rights.

> From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to the questions of fact or the construction of treaties and statutes relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) (25 U.S.C. § 194), which provides:
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> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of precious possession or ownership."
>
> This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians.
>
> 34 Op. Att'y Gen. 439, 444 (1925).

Defendants urge that notwithstanding the failure of the court to apply § 194, the court, after placing the burden of persuasion on the defendants to establish their counterclaim, found that the defendants had in fact proven by the preponderance of evidence their title in the property.[21] Although the trial court observed that it felt no presumption[22] aided

[21]Adoption of findings proposed by the successful litigant will be upheld where supported by substantial evidence and not otherwise clearly erroneous. However in the present case the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum written by the defendants. Under the cirumstances we feel compelled to repeat the admonition of the United States Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57, 84 S. Ct. 1044, 1047, 12 L.Ed.2d 12 (1964):

> Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. Moreover these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*. 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case.

(Emphasis added)(citations omitted)(footnote omitted).

[22]Under Iowa law there is a common law presumption in favor of a finding of accretion. *Kitteridge v. Ritter*, 172 Iowa 55, 151 N.W. 1097 (1915). No such presumption exists under Nebraska law. See *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960). Whether a presumption of accretion exists under federal law is uncertain; Mr. Justice Douglas alludes to such a presumption in his dissent in *Mississippi v. Arkansas*, 415 U.S. 289, 295-96, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974) (Douglas J. dissenting). *Ct. Nebraska v. Iowa*, 143 U.S. 359, 369, 12 S. Ct. 396, 36 L.Ed. 186 (1982).

> The existence of a presumption of accretion, however, does not affect the outcome here. Under the Federal Rules of Evidence a presumption loses its vitality once sufficient evidence on a disputed issue has been presented to permit a fact finder to act upon it. See Fed. R. Evid. 301; Louisell, Construing Rule 301; Instructing the Jury on Presumptions in Civil Actions and Proceedings, 63 Va. L. Rev. 281, 285 (1977); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713 (6th Cir.) cert. denied, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 303 (1975); 1 J. Weinstein & M. Berger, Weinstein's Evidence § 301(02), at 301-28 (1976); McCormick's Handbook of the Law of Evidence Ch. 36, § 345 (2d ed. E. Cleary ed. 1972). The Tribe having presented substantial conflictig evidence on the issue of accretion, any presumption of accretion disappeared and had no futher effect on their case.
>
> The presumption of accretion, which affects only the burden of going forward with evidence, should not be confused with the burden

either party, the defendants' reasoning, as adopted by the trial court, erroneously focuses on the failure of the Tribe to carry a burden of proof to establish title to the land. In discussing the factual evidence, the court's opinion focuses almost entirely on the the inablility of the Tribe to prove that the movement of the thalweg was brought about by avulsion.[23]

We find that the trial court improperly placed the burden of proof on the Indians in the instant case. Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe and therefore, notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.

We now proceed to an examination of the governing principles of law.

V. ***Law of Accretion and Avulsion.***

It is fundamental that:

> [W]here running streams are the boundaries between States, the same rule applies as between private proprie-

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of proof, that is the risk of nonpersuasion, found in § 194. As Professor Fleming James noted;

> The term "burden of proof" is used in our law to refer to two separate and quite different concepts. . . . The two distint concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence.
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> James, *Burdens of Proof*, 47 Va. L. Rev. 51 (1961).
>
> Section 194 is designed to allocate the burden of persuasion and not merely to affect the burden of going forward with the evidence.

[23] The court observed in its opinion that:

> The plaintiffs failed to sustain their burden of proving that any sudden change of the Missouri River channel occurred in the Blackbird Bend area detaching a block of Omaha Indian Reservation land from the Nebraska bank to the Iowa bank, which land was capable of identification as such, either during the period from 1867 to 1879, 1906 to 1923, as contended by the plaintiffs, or at any other time material herein.

433 F.Supp. at 88.

> tors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. . . .

Arkansas v. Tennessee, 246 U.S. 158, 173, 38 S.Ct. 301, 305, 62 L.Ed. 638 (1918).

See also Missouri v. Nebraska, 196 U.S. 23, 34-35, 25 S.Ct., 155, 49 L.Ed. 372 (1904); *Nebraska v. Iowa*, 143 U.S. at 360-61, 12 S.Ct. 396; *Mayor, Aldermen & Inhabitants of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 9 L.Ed. 573 (1836). Equally well settled is the proposition that

> [i]f the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

Arkansas v. Tennessee, supra, 246 U.S. at 173, 38 S.Ct. at 304.

See also Missouri v. Nebraska, supra, 196 U.S. at 35, 25 S.Ct. 155; *Nebraska v. Iowa*, 143 U.S. at 361, 12 S.Ct. 396.

The trial court found that the eastern boundary of the Omaha Indian Reservation changed with the shifting river since the tribe had failed to show that the river had moved by avulsion. In reaching this result the trial court ruled that an avulsion occurs only where a sudden shift in a channel cuts off land "so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed." 433 F.Supp. at 73. In doing so, the trial court rejected the plaintiffs' theory that the doctrine of avulsion is equally applicable when a sudden and perceptible shift of the thalweg occurs within the bed of the stream or over as well as around land in place. The government's evidence was that such a perceptible shift might occur when the river goes out of its bed and the land is submerged by a flood or freshet. We find the district court

too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented.[24]

The Supreme Court has defined accretion as "an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived. . . ." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 193, 10 S.Ct. 518, 522, 33 L.Ed. 872 (1890).[25] In contrast, avulsion has been said to occur in various ways. One observation is that it occurs where there is a "sudden change of the banks of a stream such as occurs when a river forms a new course by going through a bend, the sudden abandonment by a stream of its old channel and the creation of a new one, or a sudden washing from one of its banks of a considerable quantity of land and its deposit on the opposite bank."[26] III American Law of Property § 15.26, at 855-56 (1952) (footnotes omitted).

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[24] The actual trial lasted over one month; the trial record constitutes 3,216 pages and includes over 150 exhibits.

[25] The rule of accretion, which found its origins in Justinian's Institutes—

> Moreover, that ground which a river hath added to your estate by alluvion, becomes your own by the law of nations. And that is said to be *alluvion*, which is added so gradually, that no one can judge how much is added at each moment of time.

T. Cooper, The Institutes of Justinian, Lib. 11, Tit. 1, § 20 (3d ed. 1852)—was based on the proposition that the "imperceptible nature of the acquisition" is "too minute and valueless to appear worthy of legal dispute or separate ownership." Hall, *Rights of the Crown in the Sea-Shore, in* S. Moore, A History of the Foreshore 793 (1888). *See also* I.G. Baker, Halleck's International Law ch. VI, at § 25 (1908); 8 Op.Att'y Gen. 175, 177-78 (1856). Imperceptibility, in the sense that "though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 68, 23 L.Ed. 59 (1874), is the accepted test for accretion today. *See, e. g., Littlefield v. Nelson*, 246 F.2d 956, 958 (10th Cir. 1957); *United States v. Commodore Club, Inc.*, 418 F.Supp. 311, 322 (E.D.Mich.1976); *Schafer v. Schnabel*, 494 P.2d 802, 807 n. 19 (Alaska 1972).

[26] Justinian described avulsion as follows:

> But, if the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbour, it is certain, such part would still continue yours. . . .

The Institutes, *supra* § 21.

A clear distinction between accretion and the sudden and perceptible movement associated with avulsion is, however, often obscured when applied to the actual movement of uncontrolled rivers. The Supreme Court emphasized the unpredictability of the Missouri River in *Nebraska v. Iowa*, 406 U.S.117, 119, 92 S.Ct. 1379, 1381, 31 L.Ed.2d 733 (1972):

> [E]xperience showed that "the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1922]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'that of avulsion.' " Eriksson, Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927).[27]

The early decision in *St. Louis v. Rutz*, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941 (1891), illustrates an attempt at more closely defining avulsion in light of actual river conditions. The Court found that violent erosion of shoreland along the Mississippi River between 1865 and 1875 was avulsive in nature, sustaining findings that "the caving in and washing away of the same was rapid and perceptible . . . [occurring]

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[27] The early movements of the Missouri River were were described as "remarkably impetuous," flooding being common on the river.

> The regular floods are two in number, and usually occur in April and in June. The first is extremely violent and of short duration, rarely lasting over a week or ten days; it seems to come largely from the upper river. The June rise, although generally higher, is of longer duration, being influenced by local rains and the general saturation of the soil. . . . The April rise is generally the most destructive, for it shows, for a time at least, a tendency to follow the channels developed during the low water season preceding, and, as a consequence, the banks are attacked with extreme violence. . . . Both, however, have sufficient power to produce tremendous effects and bring about the most astonishing changes.

Preliminary Report Upon the Improvement of the Navigation of the Missouri River, in Annual Report of the Chief of Engineers app. S, at 1651 (1881).

principally at the spring rises or floods of high water in the Mississippi . . ." *Id.* at 231, 11 S.Ct. at 339.[28]

Rapidity of erosion as the determinative factor in a finding of avulsion was, however, rejected in early dicta in *Nebraska v. Iowa*, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 (1892). *See also Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923) (where the Court applied the rule of accretion, following *Nebraska v. Iowa*, to the Red River); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912). Although the litigated facts of *Nebraska v. Iowa* appear to have dealt only with the movement of the Missouri River cutting across the neck of a U-shaped land formation commonly known as an ox-bow,[29] the Court expressed its view that the rapidity of the process of subtraction or addition did not prevent application of the rule of accretion.

In discussing the rules of accretion and avulsion the Supreme Court quoted, among others, Vattel, an early civil law authority. Vattel's formulation of avulsion held that "when the violence of the stream separates a considerable

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[28] The perceptible nature of the erosion along the bank was described as follows:

> [D]uring each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time. . . .

St. Louis v. Rutz, 138 U.S. 226, 231, 11 S.Ct. 337, 339, 34 L.Ed. 941 (1891).

[29] The Court in its concluding paragraph relates:

> It appears, however, from the testimony that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370, 12 S.Ct. at 400.

part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner."[30] 143 U.S. at 366, 12 S.Ct. at 396.

It is obvious, however, when viewed in the context of the entire opinion, that the Court was not seeking to narrow the traditional scope of avulsion but merely to demonstrate that the rule of accretion, as traditionally defined, was equally applicable to the Missouri River. The Court, in defining avulsion, cited Gould on Waters, noting:

> It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said; "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl.Com. 262; Angell on Water Courses, § 60; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. 544; *Buttenuth v. St. Louis Bridge Co.*, 123 Illinois 535 [17 N.E. 439]; *Hagan v. Campbell*, 8 Porter (Ala.) 9; *Murry v. Sermon*, 1 Hawks (8 N.C.) 56.

143 U.S. at 361, 12 S.Ct. at 397 (emphasis added).

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[30] It is in this context that the Nebraska cases relied upon by the district court relate that one of the significant factors of avulsion is identifiable land in place. *See Conkey v. Knudsen*, 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N.W.2d 290 (1942); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935); *Iowa R.R. Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). These and several other state cases—*Yutterman v. Grier*, 112 Ark. 366, 166 S.W. 749, 751 (1914); *Longabaugh v. Johnson* 321 N.E.2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens*, 84 Iowa 241, 50 N.W. 983, 984 (1892); *McCormick v. Miller*, 239 Mo. 463, 144 S.W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 178 N.W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion all ultimately rely on either *Nebraska v. Iowa* or a Missouri case, *Benson v. Morrow*, 61 Mo. 345 (1875).

After *Nebraska v. Iowa* only a few federal cases have addressed the scope of the avulsion rule in a context other than an ox-bow cutoff involving permanently emerged land in place.[31] In *Veatch v. White*, 23 F.2d 69 (9th Cir. 1927), the facts revealed that:

> Years ago, between 1859 and 1874, in the southern shore of Puget Island there was a slough running in a northwesterly direction from the Columbia river. The slough, although only used by fishing boats, had a channel that was shallow and more or less filled with snags. So much of the area of Puget Island as was seperated from the mainland by this slough was called Coffee Island, *which gradually became submerged.* Some time before 1894 the water of the river began to bore out and enlarged the slough, and when freshet waters of 1894 came the slough was so enlarged that a channel formed, which after 1894 was used for navigation. After this new channel was created, shoals formed to some extent on the south, or Oregon, side of Coffee Island, and navigation on that side became unsafe for deep draft ships. . . .

Id. at 70 (emphasis added).

Relying on the definition of avulsion in *Nebraska v. Iowa*, the court held that:

> [T]hough *by erosion* of Puget Island the river has widened and the center of the old channel has been changed somewhat, and has become more shallow than it was at the time of the fixing of the boundary of the state of Oregon, such changes are not to be confused with changes made by the creation of the slough channel, which was caused by sudden and known causes, not by accretion. The demarking line must therefore remain the center of the channel between Puget Island and Oregon before the avulsion.

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[31] The language and expressions in the *Nebraska v. Iowa* decision may, as the Supreme Court of Alabama remarked, "cause some confusion unless care is had in observing them." *Greenfield v. Powell*, 220 Ala. 690, 127 So. 171, 172-73 (1930). See also *Willett v. Miller*, 176 Okl. 278, 55 P.2d 90, 93-94 (1935).

Id. at 71 (emphasis added).

This court applied the same rationale in *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026, 87 S.Ct. 753, 17 L.Ed.2d 674 (1967), where the end of a meander bend in the Mississippi River gradually became separated from the mainland area by a small channel. During a flood in 1938 the subsidiary channel was scoured out making it the main navigational channel following the flood. Relying upon *Nebraska v. Iowa*, this court, through Judges Vogel, Van Oosterhout and Mehaffy, held that, despite the fact that the bar separating the old and new channel was as much as four feet under water when the change occurred, the change was avulsive.[32]

Id. at 219-20. The court observed:

> In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criterion for a change in a state boundary. By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in *State of Arkansas v. State of Tennessee*, supra, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that *State of Arkansas v. State of Tennessee*, supra, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

Id. at 219 (emphasis added).

Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or

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[32] Several other decisions have also recognized that the submergence of land around or over which a channel shifts does not prevent a finding of avulsion. See *e.g.*, *Widdicombe v. Rosemiller*, 118 F. 295, 299 (C.C.W.D.Mo. 1902); *Fowler v. Wood*, 73 Kan. 511, 85 P. 763, 768 (1906); *Nix v. Dickerson*, 81 Miss. 632, 33 So. 490 (1903). Cf. *Mulry v. Norton*, 100 N.Y. 424, 3 N.E. 581 (1885).

without the river's original bed, is a critical factor in defining an avulsion.[33]

Our review of the foregoing authorities leads us to conclude that, although evidence of identifiable land in place may have some probative value that erosion has not occurred, the fact that intervening land may not be visible at the time a sudden flood or freshet occurs is not conclusive in itself.[34]

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[33] In *Eaton v. Francis*, 484 P.2d 128, 131 (Colo. App. 1971), the court held that:

> According to the trial court's findings, which were based upon sufficient evidence and are therefore binding upon appeal, the Arkansas River moved from its old location to its new one as result of the great flood in 1921. To gain by accretion, it is necessary to show a slow imperceptible shifting of the river's course over a long period of time. A sudden violent shift or avulsion, as the court found occurred here, does not shift the boundaries of the lot to conform to the new banks of the river. Rather the lots remain the same, that is, bounded upon the old bank of the river not the new.

(Citations) omitted).

See also *City of Lawrence v. McGrew*, 211 Kan. 842, 508 P.2d 930, 932 (1973); *Wood v. McAlpine*, 85 Kan. 657, 118 P. 1060 (1911); *Fowler v. Wood*, 73 Kan 511, 85 P. 763 (1906); *Sharp v. Learned*, 195 Miss. 201, 14 So.2d 218, 220 (1943); *Bode v. Rollwitz*, 60 Mont. 481, 199 P. 688 (1921); *Nolte v. Sturgeon*, 376 P.2d 616, 619-21 (Okl.1962); *Buchheit v. Glasco*, 361 P.2d 838, 841 (Okl.1961); *Harper v. Holston*, 118 Wash. 436, 205 P. 1062, 1064 (1922). Ct. *Coastal Indus. Water Auth. v. York*, 532 S. W.2d 949, 952 (Tex.1976); *Jourdan v. Abbott Constr. Co.*, *464 P.2d 311, 314 n* 3 (Wyo.1970).

[34] Both state and federal case law also recognize an exception to the accretion rule where a stream moves gradually around or jumps across a land area, thereby markedly altering the river's channel. The rule in these cases, sometimes known as "the island rule," has not been confined to islands. In *Davis v. Anderson-Tully Co.*, 252 F. 681, 685 (8th Cir. 1918), the court applied the principle to a peninsula and observed:

> To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, *not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course*, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel

To reason otherwise would be to limit the rule to the rare situation involving only an *obvious* neck cut-off where intervening land is not submerged. The history of the rule, the case law developed under it, and the policy underlying the doctrine all support a broader application.[35]

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel*

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became the main channel of navigation.

(Emphasis added).

See also Washington v. Oregon, 211 U.S. 127, 134-36, 29 S.Ct. 47, 53 L.Ed. 118 (1908); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 403-11, 20 L.Ed. 116 (1870); *Commissioners of Land Office v. United States*, 270 F. 110, 113-14 (8th Cir. 1920), *appeal dismissed*, 260 U.S. 753, 43 S.Ct. 14, 67 L.Ed. 497 (1922); *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782, 789-90 (1946).

[35] One author has noted that changes or movements of rivers may be divided into three basic categories: (1) gradual changes *in the river* caused by erosion and accretion; (2) sudden changes *in the river* caused by erosion and avulsion without cutting a new bed; and (3) where the river itself cuts a new bed. In discussing these changes, Professor Bouchez explored the policy rules behind boundary river principles:

> When an alteration in the boundary river has been caused by a gradual process of erosion and accretion, the best solution is the adjustment of the boundary to the changed situation. Such a procedure will mean that the functional meaning of the thalweg boundary will be maintained. In addition the damage caused to one of the States by slight alterations will generally be of minor importance: Damage arising from slight alterations will not continuously affect in the long run only one of the riparian States.
>
> The second category of alterations is a more difficult problem. Maintenance of the boundary as it existed before the alteration of the Thalweg will abolish the functional meaning of the thalweg boundary. If, on the other hand, the boundary follows the new thalweg serious damage may be caused to one of the riparian States. An example of such a situation is the Chamizal tract. The interests of the State put at a disadvantage by the instantaneous alterations of the thalweg must be considered as the dominant factors in order to find an equitable solution.
>
> If the injured State is primarily interested in navigation the new thalweg is perhaps the best boundary. If the area, which has been partly destroyed or seriously damaged by the alterations of the thalweg, is of vital importance for a State, the maintenance of the old boundary is to be preferred.

Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 Int'l & Comp.L.Q. 789, 808 (1963).

Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), the Supreme Court explained:

> The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied.[36]

Undisputed historical data relating to the early movements of the Missouri River make clear that the wild and uncontrolled movements of the river did not occur with mathematical precision or follow predictable paths. In fact, as the voluminous testimony and documentary evidence presented by both sides reveal, accretion and avulsion are interrelated phenomena often occurring together and in fact often acting as the motivating force for each other. Erosion and accretion, for example, may change the angle at which a river attacks a downstream bank, increasing the likelihood of an avulsive cut-through. Erosion may narrow the neck of a meander bend producing the necessary conditions for an ox-bow cut-off. Or, as the government asserts, an avulsion can produce river characteristics such as low river current energy areas which are favorable to rapid deposition.

When weighed with the significant policy considerations involved, we hold that, under governing principles, the critical determinant of avulsion is a sudden perceptible shift of the

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[36] The statement in *Bonelli* followed from earlier authorities which similarly emphasized the inequities that would arise were the rule of avulsion not available.

> [i]f the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner.

3 Farnham on Waters § 848, *quoted in Fowler v. Wood*, 73 Kan. 511, 525, 85 P. 763, 768 (1906).

channel.[37] Only where the thalweg gradually moves through the intervening land as a direct consequence of erosion *and* the imperceptible process of accretion to the forming bank do the policies underlying the accretion and avulsion rules justify altering permanent land boundaries to conform with the gradually changing thalweg.

In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion. We therefore conclude that it was error for the trial court to reject the plaintiff's legal theory in its evaluation of the evidence.

We now turn to the factual findings of the district court.

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[37] Another form of avulsion, of course, is recognized in the highly unusual case where identifiable land is visibly torn from one bank and carried downstream to a resting place. The Supreme Court, however, in *Nebraska v. Iowa*, noted that this type of avulsion could not occur on the Missouri River.

> No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore.

143 U.S. at 369, 12 S.Ct. at 399.
Cf. St. Louis v. Rutz, 138 U.S. at 249-51, 11 S.Ct.337.

VI. *The 1875-1879 Movement of the Thalweg.*

The basic finding essential to the defendants' case is the trial court's statement that "the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area . . . ." 433 F.Supp. at 88. In reviewing this finding our task is not made easier by the district court's verbatim adoption of the defendants' analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses.[38] We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence.

The defendants' proof, and the trial court's conclusion that erosion and accretion produced the movement in the river between 1875 and 1879, rest essentially upon six factual premises. First, defendants assert that bar A (see Plate II) must have been of recent origin (not land in place) since it was situated in the area formerly occupied by the old channel and because willows were the only vegetation growing on the bar. Thus, they contend that the river must have eroded the meander lobe and through the process of accretion deposited the crescent shaped sand bar depicted as bar A during its westward movement. The defendants next point to expert testimony that the remnant channel between bar A and the easterly high bank is a "common phenomenon" associated with erosion and accretion. Such channels are produced, they assert, when a river gradually moves away from its

[38] The trial court did, however, express a caveat near the end of its opinion that "certain findings of fact, even if agreed upon, would not lead in the minds of all parties concerned to a definite legal conclusion: *i. e.* that either an avulsion or an accretion took place at key times in history at particular places on the Missouri River." 433 F.Supp. at 89. The district court nonetheless concluded that it was "convinced that one particular set of conclusions can be squared with the evidence far better than other proposed conclusions." *Id.* Notwithstanding its rejection of the Tribe's or the government's broader approach to the doctrine of avulsion, the court conceded that it was "apparent that the movements of the Missouri River have not been so clean and precise that they easily fall into the legal categories conveyed by the terms 'accretion' and 'avulsion.'" *Id.*

previous channel by the process of erosion and accretion. The accretive deposition then closes the old channel at its upper end forming the remnant channel. Third, defendants' experts assert that bars B and D shown on the 1879 map could not have been identifiable land in place since they were barren of vegetation. Instead, they suggest that the bars were middle sand bars formed behind the southerly and westerly migration of the river. Defendants further contend that since no cottonwood trees, which grow only on land that is stabilized and not subject to frequent inundation, were shown to be growing on bar C, the bar must have been completely eroded away as the river moved. Defendants also find support for their accretion theory in the opinion of one of their experts that the parallel positioning of bars A, B, C and D was consistent with a gradual southwesterly movement of the river as a result of erosion of the meander lobe. Finally, the defendants introduced the experiments of Captain J. F. Friedkin[39] into evidence which, along with hydrologic experience, allegedly showed "that during high water flows, the river will flow and erode against the upper side of a point bar . . . ."[40]

The court concluded on the basis of this evidence that the meander lobe was eroded away as the channel moved over the area where the lobe had existed. Thus, the court ruled that the shift in the course of the river was a consequence of progressive scour and deposition, that is by accretion. 433 F.Supp. at 77-78.

Our analysis of the record leads us to conclude that the evidence presented at trial as a matter of law was insufficient

[39] Captain J. F. Friedkin of the United States Corps of Engineers from 1942 through 1944 conducted one of the pioneering studies of river hydrology.

[40] Defendants' expert witness, George R. Hallberg, Chief of the Research Division of the Iowa Geological Survey, testified that every meander bend has a maximum width. Once the river reaches the maximum width it becomes more efficient for it to flow over the inside of the bend, and erode across the point bar, thereby decreasing the width of the bend. This process occurs at constant discharge rates, and accelerates at high discharge. Hallberg theorized that some time between 1867 and 1875 Blackbird Bend reached its maximum width and the thalweg began flowing against the meander lobe.

to satify the defendants' burden of proving by the preponderance of the evidence that erosion and accretion were responsible for the significant shifts of the river between 1875 and 1879.

A. *Identifiable Land in Place.*

The years from 1875 through 1879 were years of extremely high water flow on the Missouri River; no other four year period equaled or exceeded the maximum discharge for those years.[41] Defendants' experts agreed that during this time the meander lobe was low, at times entirely under the surface of the moving rive and extremely vulnerable. This is corroborated by Barrett, who in his 1867 survey discribed the eastern end of the meander lobe as a low sandy point.

Recognizing that identifiable land in place may in given circumstances have probative value in helping to distinguish between accretion and avulsion, that is, at least in the sense of determining whether intervening land has been completely eroded or not, little significance can be attached to its alleged absence under the evidence adduced in the present case. The defendants urge that absence of identifiable land in place provides the necessary inference of erosion of the original reservation land. However, the trial court's finding that in 1879 bar A was of recent orgin and was not identifiable land in place does not afford a permissible inference that the original reservation land had been eroded since, as the trial court itself pointed out, at least part of bar A was located within the area of the old abandoned channel. No land could be eroded if it never existed in the first place. Under the circumstances it is obvious that bar A is nothing more than land formed by deposition after the channel was abandoned.

The evidence that bar D and part of bar B, lying to the west of bar A, and inside the Barrett Survey lines, were not identifiable land in place is equally inconclusive. It is conceded that the eastern end of the Barrett Survey was made

[41] In 1875 there was a discharge of 140,000 cubic feet per second. In the next four years, the maximum discharges recorded were 300,000, 200,000, 215,000 and 220,000 cubic feet per second.

up of sandy material. Thus, even if the river changed by avulsive movements through the end of the meander lobe, the land remaining in place would have been low and composed of sand.[42]

The trial court also found that the land which had previously occupied the area shown as bar C on the 1879 map had been completely eroded away and that bar C had formed thereafter as a middle bar as the thalweg moved to the west. The court observed: "If bar 'C' were land-in-place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890."[43] 433 F.Supp. at 77. Although it is possible that the land represented by bar C may have completely eroded, it is entirely speculative to say that that is what occurred. The record also supports the possibility that bar C, located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits. The record is insufficient to prove what actually occurred.

Under defendants' accretion theory bar C would of necessity have been comprised of relatively newly deposited soil since it was located close to the 1879 position of the thalweg. Nevertheless, the record shows that willows were growing on bar C in 1879 indicating, as Dr. McQuivey, a government witness, theorized, that the bar may well have

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[42] Barrett described the area in 1867 as follows:

> Fractional Township 24 N.R. 11 East, the 6th Principal Meridian, is a low, sandy point, subject to frequent inundations from the Missouri River.
>
> Except a few small cottonwood trees and some willows, there is almost no vegetation upon it.
>
> The Missouri River is constantly changing its banks, so that no permanent corners can be established near the water, indeed, except where there are bearing trees, none of the corners in this Township will probably remain longer than the first high freshet in the Missouri.
>
> Small quantities of coal *were* deposited in the several mounds as per instructions, but the sandy soil will not prevent it from being washed away.

[43] The 1890 reference is confusing and in obvious error. The area where bar C was located in 1879 is depicted on the 1890 map as "cleared" land.

been land in place.[44] The fact that cottonwoods were not also growing on the bar does not prove the contrary. Bar C, along with bars B and D, was located near the eastern end of the Barrett Survey which Barrett described as sandy soil and frequently inundated. Testimony in the record shows that cottonwoods did not thrive in areas subject to frequent inundation. We find the evidence concerning bar C to be highly conjectural and inconclusive as to whether it formed by accretion or was in fact identifiable land in place.

There exists another basic reason why we regard the evidence of the defendants as insubstantial. The opinion of the defendants' experts[45] that no identifiable land remained in place after the movement of the river sometime between 1875 and 1879 is essentially based upon inferences drawn from the 1879 map admittedly prepared in a 10-day period during the June rise of the Missouri River when the river was as much as five feet above its ordinary high water level. At the time the river was shown to be nearly 10,000 feet wide, whereas in 1875 the bed had been only approximately 800 feet across. Soundings taken at that time demonstrate that a substantial land area was immediately below the surface of

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[44] The government urges that the vegetation appearing on bar C is inconsistent with the theory of accretion since, if the land had in fact been washed away, it would have been the last of the visible bars to have formed and the last to develop vegetation.

[45] Each of defendants' experts viewed the existence of identifiable land in place as an essential factor in defining avulsion. Raymond L. Huber, a supervisory civil engineer employed by the Corps of Engineers, stated that

> avulsion is the transfer of the piece of land from one bank of the river to the other bank of the river, which occurs in such a manner that you can follow the movement of that transfer of land and identify it as the identical land which formerly existed on the other bank, beyond any power of question.

John F. Kennedy, a professor in the Division of Energy Engineering at the University of Iowa, and director of the Iowa Institute of Hydrologic Research, a division of the University of Iowa College of Engineering, defined avulsion as "the river shifting from one side of a block of land to the other leaving the intervening land undisturbed in the process." Finally, Dr. George R. Hallberg testified that:

> Avulsion is a term I don't use technically. But from much of my work, what I understand, avulsion to mean is a very sudden perceptible movement which would cut off and abandon a river and leave the land contained by that old channel essentially intact.

the flood water. The defendants do not contend that the river bed permanently expanded to 10,000 feet as shown in 1879; it obviously would be much narrower upon subsidence. *See e.g.*, the 1890 Missouri River Commission Map, set out as Plate V, *infra* in which the river is shown to be no more than 3,500 feet wide. The existence or nonexistence of identifiable land in place could not have been accurately assessed at a time when the river's flow was abnormally high during floods which completely inundated the adjacent land. Thus, any inferences drawn from the alleged land forms exhibited on the 1879 map appear to be highly conjectural. Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibiliy.[46] *See Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir.), *cert. denied*, 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 517 n. 65 (4th Cir. 1977); *Padgett v. Buxton-Smith Mercantile Co.*, 262 F.2d 89, 41 (10th Cir. 1958); *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705, 709 (4th Cir. 1949).[47] As this court indicated in *Uhlhorn v. U.S. Gypsum*

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[46] Wigmore in his treatise on evidence notes that while one inference may properly be built on another inference. J. Wigmore, Evidence § 41(3d ed. 1940), there is a limit to proof offered in this manner. As an example of the correct method of treating inferences Wigmore quotes from the case of *New York Life Ins. Co. v. McNeely*, 52 Ariz. 181, 79 p.2d 948 (1938), in which the court observed:

> "It is true, of course, that in everyday life, all men frequently act as the result of the repeated piling of inferences upon inferences, and, as a matter of strict logic, if an inference has any probative value whatever in aiding one to determine the ultimate question of fact, it should be considered. The principle which is applied by the average man in his own private affairs usually is that no matter how many inferences are piled on each other, it is only necessary that each successive inference should be more probable than any other which might be drawn under all the circumstances. The Courts, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibilities, conjectures, or even, generally speaking, a bare probability." J. Wigmore, *supra* §41, at 439.

[47] *Cf. Logsdon v. Baker*, 170 U.S.App.D.C. 360, 361, 517 F.2d 174, 175 (1875), where the court held that reliance on "brake marks" purported to be visible in photographs but which could not be discerned by the district judge or the appeals court was held to be an inadequate basis for an expert opinion on the cause of an accident since the expert's opinion would be "too speculative."

Co., 366 F.2d at 219-20, if land over which a channel changes during abnormal high water periods, inundating all intervening land masses, is identifiable as the same land mass upon subsidence of the high water, the boundary does not change even though the land's surface may be somewhat eroded.

Defendants' experts also relied upon inferences drawn from the existence of remnant channel formations, from the parallel positioning of bars A, B, C and D and their interpretation of applicable principles of hydrology. The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion reached from these factual premises.

B. ***Remnant Channels.***

The defendants rely on evidence of remnant channels in the Blackbird Bend area as a "common phenomenon" associated with the progressive and gradual movement of a channel as a result of accretion. However, this evidence was proffered only as a possible alternative explanation to the plaintiffs' evidence that the remnant channel areas demonstrated avulsive changes in the thalweg.[48]

The evidence further reflects that Dr. John F. Kennedy testified that, as the thalweg shifted to the west, the low energy level of the river in the former channel created by the movement would result in deposition there. The defendants conclude from this that the shift in the river was "a consequence of progressive scour and deposition." The testimony of defendants' expert, Dr. Kennedy, showed, however, that the shift of the thalweg is often the responsible agent for the

[48] The Tribe and the government substantiated their argument that the remnant channels were more consistent with avulsive than accretive movement by presenting evidence of soil samples taken in the area immediately to the east of the Barrett Survey line which showed concentrations of silt and clay in the remnant channels. Concentrations of silt and clay were said by plaintiffs' experts to be inconsistent with the gradual, imperceptible, and progressive action associated with accretion which was said to produce more uniform deposits. The defendants attempted to refute this by testimony that the remnant channel was cut off at the top by formation of a point bar and alluvial deposits would therefore not reach the channel.

"subsequent diminished sediment transport capacity of the water." Thus, the testimony is inconclusive as to whether the remnant channel was formed by accretion or avulsion since a remnant chute might also have been formed after the thalweg suddenly and perceptibly moved. In the latter case the deposition forming the remnant channel would be the effect of the low river energy in the area brought about by the sudden avulsive shift of the thalweg rather than a consequence of accretion. As the Supreme Court observed *in Arkansas v. Tennessee*, 246 U.S. at 175, 38 S.Ct. at 305,

> if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, *and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.*

(Emphasis added).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstance shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion.[49]

Bar Formation.

Just as the remnant channels may have formed as the effect of an avulsion rather than as the result of accretion, the parallel positioning of bars A, B, C and D, while perhaps

[49] *See Galloway v. United States*, 319 U.S. 372, 386-87, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943). Raymond L. Huber, one of defendants' witnesses, conceded that, given the factual basis available to him, he was only able to give an "educated guess" as to what caused the river to move between 1875 and 1879.

characteristic of accretion, could have resulted from the accretion which followed as an effect of avulsion as well. Moreover, as we have discussed the actual surface positioning of those bars based on the 1879 map is conjectural since the contours were drawn at the high water stage which existed at that time.

D. *Captain Friedkin's Experiments.*

The final proofs which defendants and the trial court relied on to establish accretion as the cause of the river's movement were Captain Friedkin's experiments and general principles of hydrology. Both Friedkin's experiments and principles of hydrology, however, provide strong evidence that avulsive change may have produced the 1879 movement. Friedkin noted that when a meander bend reaches its limiting width,[50] as it is conceded Blackbird Bend had here, it does not stop caving its banks. Instead, "[t]he flow short-cuts over the convex bars of bends, chute channels form, and a new bend develops a little farther downstream." J. Friedkin, Meandering of Alluvial Rivers 14 (1945) (footnote omitted). Such chute channels[51] are avulsive since the channel moves around or over, not imperceptibly through the interjacent land. One of the defendants' witnesses, Dr. George R. Hallberg, testified that it was quite possible that chutes similar to those described by Friedkin could have formed along the eastern edge of Blackbird Bend, although he felt the area was probably submerged when this occurred. Hallberg's testimony concurred with the government's expert, Dr. Paul McQuivey, a research hydrologist, who testified that, when a river is at high flow it tends to increase its radius, that is, it tends to take a more direct course rather than a meandering

[50] The limiting width of a meander bend is the maximum distance the river will travel away from the general direction of a river's flow.

See J. Friedkin, Meandering of Alluvial Rivers 14 (1945).

[51] A chute channel is defined as "a channel across a bar or a pointway channel. It differs from cut-off, wherein a river cuts through a narrow neck which has been developed between the upper and lower arms of a bend." *Id.* n. 1.

one.[52] To do so, he continued, the thalweg moves to the inside of the bend, and erodes new chute channels[53] through the point bar. Eventually, the record shows, one of the chute channels large enough to carry the main flow of the river, and the river abandons the old channel.[54] *Cf. Veatch v. White*, 23 F.2d at 70.

In addition to the evidence suggesting that the movement of the river in 1879 could have occurred through a series of chute channels, the evidence also supports the possibility that during this same time a cut-off could have occurred across the neck of Blackbird Bend.[55] Friedkin also described the conditions when a cut-off is likely:

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[52] Dr. Kennedy, defendants' expert, verified McQuivey's testimony in observing that "(d)uring these extreme inundations, the channel, of course, likes to take a shorter path."

[53] The fact that during high water a river's flow tends to move to the inside of a meander bend was substantiated by the defendants' witness Huber who testified:

> I will show you an example of a chute cut-off. Take the example of Tieville Bend, which is just below the Blackbird Bend area, below the Barrett Survey—
>
> . . . . . .
>
> Now there was a shore chute which had never entirely dried up, had some flow, so that in the high water period of 1943 and later again in 1952 (the velocity across this area from the upper end to the lower end of the chute was so great as compared with the velocity around the old bend that it caused some filling of the old channel and it caused a new channel to develop.
>
> Essentially this channel filled up at the upper end to the point that I believe you can walk across it. The lower end is still open, so this would be a chute avulsion.

Huber also pointed out that:

> In a very low stage there is insufficient hydraulic energy for the river to cut across any sandbars with the velocity of two or three miles to an hour-two to three miles an hour, I said, so that it has to follow the easternmost high bank. Then as the stage increases up to flood stage, which could be even up to ten miles an hour, a channel will then seek the shorter path across the area, across the bare peninsula, and develop a new channel west, which will be even deeper than the channel against the main bank, for the reason that you have greater bed scar [sic; should read scour], you have greater discharge.

[54] McQuivey pointed out several remnant channels in the area of the peninsula.

[55] In *United States v. Flower*, 108 F.2d 298 (8th Cir. 1939), the court found a neck cut-off had occurred only a few miles above Blackbird Bend in 1916 after the river had formed a very wide meander bend.

> Natural cut-offs occur when a meandering river develops and finally erodes through a narrow neck between the upper and lower arms of a bend. . . . In over 50 laboratory streams in uniform materials not a single cut-off of this type developed. This fact indicates that natural cut-offs result from local differences in the erodibility of bank materials.
>
> * * * * *
>
> With all bends in a meandering river migrating down the valley at the same rate, a cut-off cannot possibly develop. The upper arm of a bend never catches up with the lower arm. For a natural cut-off to develop, erosion on the downstream bank of the lower arm of a bend must be slower than along the upper arm. Generally, when a cut-off develops, erosion in the bend proper has taken place so that the flow in the lower arm of the bend has become directed up-valley . . . and a narrow neck has developed. It is therefore, indicated that it is the local differences in erodibility of the bank materials in natural rivers which cause narrow necks to form and cut-offs to develop.

Friedkin, *supra* at 16.[56]

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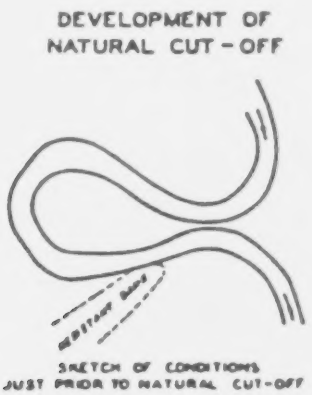
[56] Friedkin provides the following illustration of the circumstances which promote natural cut-offs.



Friedkin, *supra* plate 25.

An examination of Tribe Exhibit 96, an 1875 map of Monona County, Iowa, shows a narrowing of the meander bend in the area between sections 29 and 30 which closely resembles Friedkin's sketch.

There exists strong corroborative proof of such occurrences from Barrett's field notes made during his 1867 survey. He wrote:

> Until very recently, appearances indicated that this point was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river.

Tribe exhibit 26E, at 6.

The evidence also demonstrated that the Iowa south bank of the Blackbird Bend area was composed of erosion resistant material which would have prevented the southerly movement of the meander bend and made a cut-off possible. *Cf.* Friedkin, *supra* at 16-17.[57] In addition, the record shows that the potential for breakthroughs in the 1875 through 1879 period was enhanced by high water flows during those years.[58]

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[57] In the years immediately prior to 1879 the north and south banks of the Blackbird Bend meander lobe had considerably narrowed. Noting this condition, Dr. Robinson testified that:

> (F)rom a study of river morphology we can predict that something is about to happen. The river is out of balance with its environment and it's because of this resisted layer at the south that does not allow the classic of the wood [sic] where we have homogeneous materials throughout the river to move south.
>
> . . . . . .
>
> I would predict if I were in a study that there would be a point bar cut-off or a shoot [sic] developed through there that would develop into the main channel of the river and we would have an abandonment of the 1875 channel and the development of a new channel on a shorter and straighter course between the two limbs of the meander.

[58] Studies made by the Corps of Engineers received in evidence also lend support to the concept that channels often change location precipitously in both high and low stages. The report reads:

> During flood stages the general movement of sand is in a measure arrested on the shoals, and, as a consequence, the low-water channels leading through them are silted up, while new ones are developed which accommodate the high-water flow. As the river falls these latter channels are silted up, and the water ponds up behind the bar until sufficient head is attained to force a breach through the crest at one or several points.
>
> . . . . . .

Based on the foregoing analysis we find the factal predicate, supporting defendants' theory as the causative reason for the river's movement, is in large part conjectural and the opinions drawn therefrom must be viewed as speculative. Under the circumstances we hold that the defendants have failed to meet their burden of proof that the significant and marked changes of the Missouri River between 1875 and 1879 were the result of erosion and gradual imperceptible accretion to the Iowa bank.

VII. ***The River Between 1879 and 1912***

In 1881 the highest flood waters of any time since reliable records have been kept occurred on the Missouri River. However, no maps were introduced to show the location of the river between 1879 and 1890. The next map available after 1879 is the 1890 Missouri River Commission map, see Plate V, which shows the thalweg to have moved north and somewhat to the east of its 1879 location. Significantly, the river is shown to occupy far less area than that shown on the 1879 map and the land to the east of the thalweg is shown as stabilized soil with permanent vegetation growing on it.

The trial court felt these facts "simply [show] the normal and logical progression of the accretion which was shown to be forming in 1879 . . . ." 433 F.Supp. at 79. There exists no factual predicate whatsoever to support this conclusion.[59]

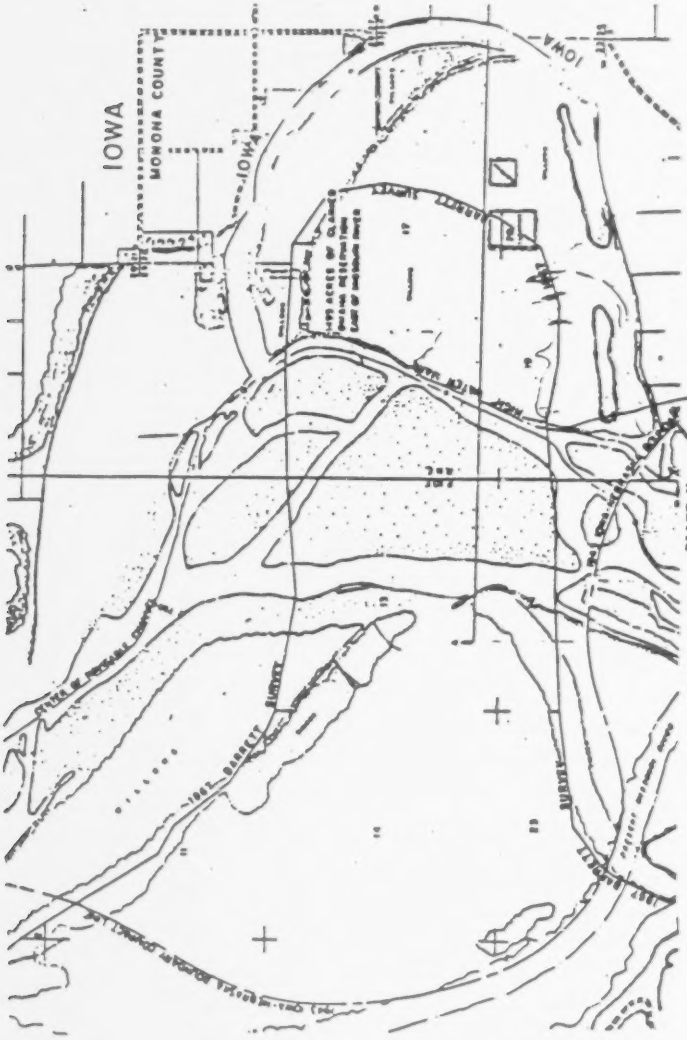
After 1890 the river moved in a northerly and easterly direction to a position shown as the northerly high bank in approximately 1912. See Plate III.

We now turn to the trial court's findings and the factual discussion involving the marked change in the course of the river between 1912 and 1923.

During the course of the low-water season the main channel keeps shifting from one subsidiary channel to another, these changes of location are often very great, and the uncertainty thereon attendant forms one of the greatest drawbacks to navigation. The high-water channels, before alluded to, are, in the Missouri, of the same general character as those of low-water, but they rarely coincide with them. They are less tortuous as a rule, but not of much greater depth, and they are liable to the same rapid changes of location. *Preliminary Report Upon the Improvement of the Navigation of the Missouri River*, in Annual Report of the Chief of Engineers app. S, at 1655 (1881).

[59] Assuming that the 1890 map shows stabilized accretion land, as the district court found, it is plausible that the "accretion" may have formed from deposition of sediment resulting from a sudden and perceptible shift of the thalweg.

Cite as 675 F.2d 626 (1978)



VIII. *The 1912-1923 Movement of the Thalweg.*

The trial court found, again relying upon the defendants' analysis of the evidence, that the 1912 through 1923 movement of the Missouri River was also a direct result of erosion and imperceptible accretion to the Iowa riparian land. The court concluded:

> [T]he Court finds that there were no avulsions in the Blackbird Bend area between 1890 and 1923, and that the movements of the river during that period of time were erosive in nature so that accretion was being formed on the side of the river opposite the erosion. The Court finds that after 1890 the river moved erosively until it reached what is now the northerly high bank following which it commenced a southern migration throughout the Blackbird Bend area until it reached its 1923 position. This migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners.

433 F. Supp. at 85.

The defendants contend that the river moved in a slow progressive movement south and westward to bring about the remarkable change in the thalweg between 1912 and 1923. Compare Plate III with Plate Iv. The basic disagreement between the experts for both sides still exists. The defendants' experts—Hallberg, Kennedy, and Raymond I. Huber—testified that sometime around 1912 the river moved away from the northerly high bank and began to erode to the south depositing accretion materials to Iowa riparian land. It was their theory that all of the land in the path of the river was eroded away. On the other hand, the plaintiffs' experts varied in their appraisal of the river movement during this period. Elmer M. Clark, an aerial surveyor, believed that the river achieved its 1923 position by one or more sudden and noticeable movements of the channel. Plaintiffs' witness, Dr. Charles S. Robinson, a geologist, thought the southward

movement occurred suddenly during one high water period in a matter of a few days or months. Dr. McQuivey, the government's expert, felt that the river moved as a result of several avulsive point bar cut-offs.

In reviewing the record, we cannot, but echo the words of witness Huber, that it is again only an "educated guess" as to just how the river moved. The extremely speculative assessment of the reasons for the river's movement offered by the defendants is not sufficient to sustain their burden of proof.

The evidence relied upon by the defendants, and the court in reaching its conclusion that accretion caused the 1912-1923 river movement, falls essentially within four areas of discussion. First, the defendants' experts point to evidence of the absence of identifiable land in place. This evidence consisted of testimony from witnesses who had lived in the Blackbird Bend area at the time of the movement that the land on the Iowa side was "new accretion land." Defendants' witnesses also pointed out that there were no geologic or geomorphic formations evident that were typical of avusive river movement. In addition, the defendants alleged that no trees could be found which predated the movement away from the northerly high bank.[60]

Second, defendants' experts asserted that a change in the Missouri river above Blackbird Bend altered the angle of approach of the river into Blackbird Band ultimately producing a southerly migration of the river. In support of this point the defendants introduced in evidence a 1912 survey showing a developing sand bar on the Iowa shore (referred to as the Fairchild sand bar) said to be consistent with a changed angle of entry. The defendants' witnesses also

[60] The testimony related to the existence of trees as proof of indentifiable land in place was conflicting. Two trees pre-dating the 1912 movement were identified by the Tribe's witness George S. Gorsuch, a forester with extensive experience in dendrochronology (the study of time-span within trees). The defendants contended, and the trail court found that these trees were located on the edge of a sandbar that had allegedly built south of the northerly high bank prior to 1912. However, the contours of the sandbar were never surveyed and its exact location could not have been ascertained.

contended that hydrological principles would predict erosive changes in the river as a result of the change of the angle at which the river entered Blackbird Bend. Complimenting this proof were several Indian allotment letters which documented erosion in the northwestern part of the Blackbird Bend meander lobe at a point opposite the formation of the Fairchild sand bar.[61]

Third, topographic cross-sections prepared by Dr. Hallberg showed that the land surface gradient in the Blackbird Bend area sloped from northwest to southeast, and that the land formations in the area were progressively lower in elevation in the southeast. In his opinion, this gradient was compatible with a theory of bar growth on the northeast side of the river as it migrated to the southwest.

Finally, the defendants relied on soil analysis which allegedly revealed findings consistent with the southward and eastward accretive movement of the river.[62] The government's expert, Dr. McQuivey, had testified that analysis of soil samples taken in the area produced data indicating that the soil becomes sandier as one moves westward in the Blackbird Bend area. Dr. Hallberg utilized this data to theorize that the sandier nature of the western edge of Blackbird Bend indicated that remnant channels had formed behind accretive point bars deposited as the river slowly moved to the southwest.[63]

Very few facts relating to the actual river movement in the period between 1912 and 1923 are proven on the record. First it is clear that the thalweg had moved substantially in

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[61] The allotment letters concerned requests by certain members of the Omaha Tribe that their land allotments be exchanged for new allotments because the land originally allotted them was being or had been washed away by the Missouri River.

[62] The parallelism of the bars between the remnant channel formations was also relied on to support an accretion theory. We have discussed the speculative significance of the parallelism of land features earlier. See discussion in section VI(C) *supra*.

[63] Hallberg stated that the existence of marshy areas and well-defined channel remnants to the east, in contrast to drier areas and less well-defined remnant channels to the west, supported the theory that as the channel shifted away from its bank to keep up with the growing point bar it subsequently backfilled the area creating the remnants.

a relatively short period of time; perhaps as few as three years,[64] but no more than 11 years. Second, as the trial court found, substantial high water periods occurred in 1905, 1906, 1912, 1913, 1915, 1916 and 1920. 433 F.Supp. at 83. Third, the angle of approach of the river had changed subjecting the adjacent land in place to at lease surface erosion. Furthermore, substantial erosion was undeniably occurring along the Nebraska shore[65] Finally, it is beyond dispute that remnant channel-like formations may be identified by soil samples and aerial photographs. These extablished facts do not prove that either accretion or avulsion caused the river's movement; the issue remains whether they may form a sufficient factual predicate for defendants' witnesses to conclude that the marked change of the thalweg was a gradual one directly caused by erosion and imperceptible deposition to the Iowa land. We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194.

The expert opinions and the lay testimony indicating that land in place could not be identified in the area are not sufficient to prove that accretion was responsible for the 1912-1923 movement. It is well established on the record that after 1890 as the river moved in a northerly direction alluvion soil subject to frequent inundation was deposited throughout much of the area. Thereafter, when the river moved southwesterly away from the northerly high bank, either by accretion or as the result of avulsion, this sandy area would not reveal any conspicuous identifiable features. The fact that some erosive action occurred in the northwest corner of the Barrett Survey area does not support the inference that accretion was the primary cause for the movement. As we have noted earlier, erosion may readily occur along with

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[64] The testimony of Ross Willey indicated that the river still flowed in the easterly English Bayou area in 1916. Another lay witness, Judge George W. Prichard, who had traveled the area on horseback in 1919, gave testimony which tends to support the fact that most of the southerly movement of the river had been completed by 1919.

[65] A large stand of timber shown in the northwest corner of the Barrett Survey area prior to 1923 was no longer visible in a 1927 aerial survey of the area, indicating the land on which it stood had been eroded.

avulsive movements of a river; the two phenomena may often take place together. Under the circumstances the absence of identifiable land in place has little probative value in determining whether erosion and accretion were in fact the responsible elements for the 1912 through 1923 movement of the river.[66]

Aside from the inconclusive evidence relating to identifiable land in place, little can be found in the record that supports the defendants' position. The fact that the river changed its angle of approach does not in itself support an inference that, accretion was responsible for the changed movement of the thalweg. Although the change may have altered the erosion patterns in the Blackbird Bend area, it is still a tenuous conclusion at best to infer from this that the thalweg moved imperceptibly. While reasoned deductions may be made from probative facts, the ultimate conclusion may not rest on mere guesswork. Similarly, as in the 1875-79 river movement, the sandbars and the gradient of the land could have just as easily occurred from deposition resulting from low river energy caused by avulsive movements of the river as by a gradual shift or movement of the thalweg.

The little solid scientific evidence in the record contradicts the defendants' theory of how the river moved. Soil samples taken in the area by government experts[67] corroborate Dr. McQuivey's testimony of the existence of four major

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[66] The absence of trees in the area north of the Barrett Survey does not support an inference that the land had been completely eroded by the river's southwesterly movement. Depending upon the nature of the river's northerly movement, all trees growing in the area prior to 1912 may have been washed away. In addition, the record indicates that many of the trees growing in the area after 1923 were cut for firewood in the 1930's.

[67] The government had performed extensive soil analysis of the Blackbird Bend area. On government exhibit 151, which summarized the results of that analysis, the government's experts depicted those areas within the Blackbird Bend area where the soil samples indicated remnant channels, and those areas were the soil samples indicated bar-like formations.

channel remnants.[68] Aerial photographs made in 1925 also indicated the channel remnants in the area. Although the defendants presented an alternative theory of how the remnant channels might have formed, their existence is strongly probative of the government's theory that the river migrated from the northerly high bank to its 1923 position by a series of four point bar cut-offs.

We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map.

IX. *Conclusion.*

The district court's ruling, adopting the defendants' theory of their case, depends on the assumption that the doctrine of avulsion is not applicable without evidence of identifiable land in place. On the record presented we deem this an erroneous legal assumption. When considered in the context of the broader parameters of evulsion we hold the defendants' case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the

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[68] These soil samples point out the existence of the remnant channels. McQuivey, the government's expert, testified that:

> Looking at Sample 61 and 56, 61 was slit on the top. There was some fine, very fine sand down to a depth of four feet, and then down to a depth of approximately twenty feet was soil clay. That is an indication of an old channel-type deposit, where the water has not been running in, and it's an area of back water or slack water to where the slits and the fine clay can be settled out.
>
> So basically, we can determine from the soil samples if there was an old channel there.

The defendants' witness did not dispute the validity of the soil samples but, instead, presented only alternate theories as to how possibly the non-alluvion soil was deposited.

circumsatances, we hold that the defendants have failed in sustaining their burden of proof under § 194.[69]

We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an onerous burden. This may seem to be an injustice when one considers have possessed and continuously farmed the land without protest for nearly 40 years. However, as the trail judge observed in a letter written to counsel after trial, divesting the Omaha Indian tribe of their original reservation land promotes an equal injustice.

While burdening either side in this case with proving the movements of the river occurring many years ago may result in undesirable hardships, the clear policy of the federal government mandates that the interests of the Omaha Indian Tribe be given their historical and statutory protection. These important possessory land interests cannot be taken away on proof that is basically speculative and conjectural.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment

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[69] How the river reached its outer eastern limit in 1875 or moved to its most northerly point in and around 1912 is outside the confines of this case. The Tribe contends erosion and accretion where responsible for these movements and there exists statements in the briefs in which it appears that the defendants have conceded this to be true. However, any such concession may have been predicated on an erroneous view of the law and should not be deemed binding under the circumstances. In using the word "accretion" in the context of the easterly movement from 1875 to 1879 and of the northeasterly movement from 1890 to 1912 we understand the defendants as merely saying that there has been deposition of land added to the Barrett Survey area. This land is all outside of the Barrett Survey and beyond the limits of the reservation established by treaty in 1854. The application of § 194 placing the burden of proof on the defendants in the present litigation is not controlling as it affects the area outside the original reservation. We do not in any way attempt to prejudge the several claims; nor do we foreclose the right of the plaintiffs to urge that § 194 is applicable under different proof. We simply note that the same proof showing presumptive title (Treaty of 1854) to the reservation cannot govern any futher litigation concerning the lands outside that area.

quieting title in the trust lands involved in this action[70] in the United States as trustee, and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854 are ordered dissolved.[71]

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[70] The government excepted from its complaint any claim to approximately 400 acres of land within the Barrett Survey which may have been allotted to individual Indians and subsequently patented to non-Indians. Any current claims to those lands by the Tribe might be affected by issues of adverse possession and laches. We therefore remand to the district court those claims related to the land excepted from the government's complaint for a determination on the above mentioned issues.

[71] Plaintiffs question whether the trial court's judgment was final since it lacked certification under Fed.R.Civ.P. 54(b). The claims here on appeal were severed from claims to land outside the Barrett Survey, asserted in C-75-4067, by order of Judge McManus. The severed claims in C-75-4067 had been previously joined with quiet title actions pertaining only to the 2,900 acres of land within the Barrett Survey filed by the United States in C-75-4024 and by the Tribe in C-75-4026 which are on appeal here. Thus the district court settled all of the questions of ownership involving the lands within the Omaha Indian Tribe's original 1854 reservation boundaries. Under the circumstances we view the severed claim in C-75-4067 as a wholly separate action which had been joined with the quiet title suits so that the judgment entered by the district court resolved the entire controversy then before it. Rule 54(b) therefore, has no application since all, not "fewer than all of the claims" before the trial court were resolved by its judgment.

APPENDIX J

UNITED STATES

v.

Roy Tibbals WILSON, *et al.*

OMAHA INDIAN TRIBE, *etc.*

v.

Harold JACKSON, *et al.*

OMAHA INDIAN TRIBE, *etc.*

v.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY *et al.*

Nos. C 75-4024, C 75-4026, and C 75-4067

United States District Court,
N. D. Iowa, W. D.
May 4, 1977

Gentlemen:

MEMORANDUM OPINION

This is a memorandum opinion prepared and filed by the Court for the purpose of setting out this Court's resolution of the choice of law problems presented by these consolidated Blackbird Bend-Barrett Survey Area cases. As will be discussed below, the choice of law problems are of primary importance in dealing with the allocation of the burden of persuasion in these cases, but would not be determinative of the general definitions of the terms accretion and avulsion.

I.

Generally, questions of title to land situated within a state are governed by that state's law, regardless of whether such questions are being litigated in state or federal courts. *Mason v. United States*, 260 U.S. 545, 43 S. Ct. 200 (1923). This general proposition extends not only to questions of legal title *per se*, but also to questions concerning the rights of riparian landowners to accretion lands. *Joy v. City of St. Louis*, 201 U.S. 332, 26 S. Ct. 478 (1906). The rule established by the case law has been incorporated into a codification known as the Rules of Decision Act, 28 U.S.C. § 1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The above-quoted statute does apply to disputes over title to land. *Mason v. United States*, 260 U.S. 545, 43 S. Ct. 200 (1923). Thus, unless federal law provides otherwise, state law would provide the rule of decision for this case. It should be noted at this point that, in the event state law does in fact

supply the rule of decision, Fed. R. Evid. 302 would apply as well, Fed. R. Evid. 302 provides:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with state law.

See also Cities Service Oil Co. v. Dunlop, 308 U.S. 208, 60 S. Ct. 201 (1939).[1]

Before any discussion of the issue whether a provision in the constitution, treaties or congressional enactments compels an exception to the rule that state law controls disputes over title to real property, the problem of which state law would apply should be dealt with. The land involved in this litigation was on the Nebraska side of the river as of 1867. The thalweg of the Missouri River was the Nebraska-Iowa boundary prior to 1943. *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396 (1892). Prior to the 1943 Nebraska-Iowa Boundary Compact, the movements of the river would be directly relevant (indeed, any accretion river movements would be controlling) on the location of the Nebraska-Iowa boundary. *Id.* With the 1943 Nebraska-Iowa Boundary Compact, one point became firmly established: regardless of who owns the Blackbird Bend area within the 1867 Barrett Survey Meander line, that area is on the Iowa side of the boundary. The difficulty here of course lies in the fact that significant changes in the location of the river occurred prior to 1943. The general choice of the problems created by this situation came to a halt in the case of *Nebraska v. Iowa*, 406 U.S. 117, 92 S. Ct. 1379 (1972). In that case the Supreme Court began by adopting the Special Master's finding

> . . . that by 1943 the shifts of the river channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it

[1]While the defendants here are urging the use of Iowa law in order to avail themselves of Iowa's presumption in favor of accretion, it is at least arguable that federal law may recognize a similar presumption. *See Mississippi v. Arkansas*, 415 U.S. 289, 94 S. Ct. 1046 (1974), *cf.* 78 Am. Jur. 2d 874, Waters § 427 (1975).

would be practically impossible to locate the original boundary line. 406 U.S. at 119, 92 S. Ct at 1381.

The 1972 Nebraska-Iowa case bagan when Iowa claimed thirty separate parcels which were wholly on the Iowa side of the 1943 compact line. For purposes of resolving the choice of law issues, the Court divided the thirty parcels into two groups. The classification was based on whether the land in the parcels was formed before or after 1943. With respect to the parcels which were found by the Special Master to have been formed after 1943, the Court held that Iowa law would govern title disputes, except that claimants to those areas would have the opportunity to show good title under Nebraska law as of the 1943 Compact date. Significantly, the Court found that Blackbird Bend was one of the areas formed after 1943. 406 U.S. 117 at 120 n. 4, 92 S. Ct. 1379, 1382 (1972).[2]

Thus, under the 1972 *Nebraska v. Iowa* decision, Nebraska law would provide the rule of decision for land disputes as to river changes occurring prior to 1943, and Iowa law would provide the rule of decision for changes occurring after that date. These guidelines would clearly apply if all of the parties to this lawsuit were private, non-governmental entities. Thus the issue to be resolved is whether the fact that the United States as trustee and the Omaha Indian Tribe as beneficiary are claimants to the land involved in this lawsuit creates an exception to the general rule that state law controls in land litigation.

Contrary to the government's assertion, the fact that the United States, as trustee for the Tribe, claims the land involved in this lawsuit does not make federal law controlling. *See Mason v. United States*, 260 U.S. 545, 43 S. Ct. 200 (1923); *see also United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 595, 93 S. Ct. 2389, 2398 (1973); *Wright*, 14 *Federal Practice and Procedure*, 141 N. 4 (1976). The case of *Hughes v. State of Washington*, 389 U.S.

[2] Of course, this finding is not *res judicata* as to the factual issues raised in the instant case, but serves only to help arrive at a practical resolution of the choice of law problems.

290, 88 S. Ct. 438 (1967), might arguably support an argument that the presence of the United States as a claimant converts the case to one governed by federal law. However, it appears that *Hughes* is limited to its somewhat unique factual situation, which involved ocean-front property and thus was closely involved with the nation's international boundaries. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, —U.S.—, 97 S. Ct. 582, 590 n. 6 (1977).[3]

Further, the majority of cases which have decided the question have turned to state law to resolve questions of land ownership when Indian tribes are involved as claimants. In the case of *Fontenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), *aff'd* 430 F. 2d 143 (8th Cir. 1970), Nebraska law was applied in an accretion-avulsion dispute between the Omaha Indian Tribe and private claimants who were descendants of, and traced their title back to, Logan Fontenelle, who had been a chief of the Omahas. *See also Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956), which applied Oklahoma law in a title dispute between an Indian tribe and private claimants. Finally, the case of *Francis v. Francis*, 203 U.S. 233, 27 S. Ct. 129 (1906), upheld the determination of the Michigan Supreme Court that an Indian treaty reserved certain lands to individual Indians in fee simple, thus giving the individual Indians and their heirs the right to convey the land without restriction and making title in the land subject to an adverse possession claim. In *Francis*, the Supreme Court stated:

> . . . the construction of the treaty here involved, whereby the respective Indians named in its 3d article are held to have acquired by the treaty a title in fee to the land reserved to the use of themselves, has become a rule of property in the state where the land is situated. That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty of 1819.

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[3] In any event, *Hughes* was concerned only with the question whether a title included accretion lands deposited subsequent to issuance of a patent, not whether accretion had in fact occurred.

In short, the fact that the United States and the Omaha Indian Tribe are claimants to the Blackbird Bend area within the 1867 Barrett Survey meander line does not, standing alone, alter the general rule that the law of real property ownership is found in the law of the state in which the property in question is situated.

Under the Rules of Decision Act, 25 U.S.C. § 1652, the Constitution, treaties and Acts of Congress must be examined in each case to determine whether federal law supplants state law as the rule of decision.

The Constitution contains nothing which would compel an exception to the general rule. While it may be that the commerce clause, Article I, § 8, Cl. 3, would empower Congress to mandate the use of federal law in cases such as this, Congress has not done so. It seems clear that neither the terms of the commerce clause nor reasonable inferences to be drawn from those terms compel abandonment of state law in this case.

An examination of the three treaties received into evidence which relate to the Omaha Tribe (Treaty with the Sauk and Foxes, et al., 1830; Treaty with the Oto, et al., 1836; Treaty with the Omaha, 1854), together with the "Documents of Selection" (under which the Omaha Tribe selected their reservation lands) discloses that nothing in these treaties and documents precludes the application of state law. The only express limitations which the treaties place upon disposition of the lands are the restraints against alienation familiar to Indian law. To the extent that they supplant state law, such restraints do create an exception to the general rule that state law controls the tenure, transfer, control and disposition of real property. *Sunderland v. United States,* 266 U.S. 226, 45 S. Ct. 64 (1924).

Research has disclosed no Act of Congress which displaces state law with federal law in cases such as this. While there need not be an express repudiation of state law, there must be some indication of a need for the use of federal law, such as a case where federal land acquisition has been part of an extensive federal regulatory program. *United States v.*

Little Lake Misere Land Company, Inc., 412 U.S. 580, 93 S. Ct. 2389 (1973). This Court is unable to discern any federal policy broad or strong enough to supplant the strong local policy concerning title to land. This case should be governed by state law. Virtually all of the analogous cases have used state law. In short, this case should be governed by the choice of law principles laid down in *Nebraska v. Iowa,* 406 U.S. 117, 92 S. Ct. 1379 (1972).

II.

Nebraska law recognizes and adheres to the principles developed at common law for the resolution of title and boundary disputes which arise when the contour of riparian land has been changed by a river's movements. Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N.W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 148 N.W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen,* 63 Neb. 327, 88 N.W. 512 (1901).

Nebraska law generally defines the process of accretion as the slow gradual and imperceptible addition by a body of water of solid material, made up of silt and sediment, against and to a shore line. *See Mercurio v. Duncan,* 131 Neb. 767, 269 N.W. 901 (1936). Accretions become attached to and extend an existing riparian shore line. *Jones v. Schmidt,* 170 Neb. 351, 102 N.W. 2d 640 (1930). Nebraska law also applies the law of accretion (*i.e.* that accretion land becomes the property of the raparian landowner of the land to which it attaches) to land uncovered by a process known as reliction. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N.W. 647 (1935). Reliction is defined as the process by which a

gradual recession of water from a shore line uncovers land. *Id.*

One of the indicia of accretion is that the water's deposit of the silt and sediment along the shore line has been gradual and imperceptible. *Mercurio v. Duncan*, 131 Neb. 767, 269 N.W. 901 (1936). Nebraska law has objectively defined the terms gradual and imperceptible to mean that, while an observer of riparian land could see from time to time that erosion had taken place and that deposits had been made, the process of erosion and deposition could not be observed while it was actually taking place. *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894). The fact that a gradual and imperceptible deposit of alluvion is one indication of accretion does not, however, mean that Nebraska law recognizes the length of time involved in a river movement as a stong element of an accretion case. This point is particularly important in the resolution of a dispute over whether a change in the location of the Missouri River has been by accretion or by avulsion. In this case of *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901), the Nebraska Supreme Court rejected a contention that the law of accretion should not apply to the Missouri. The contention rejected in *DeLong* was based upon the generally acknowledged phenomenon that even erosive changes in the channel and banks of the Missouri River are too rapid and too perceptible to allow the land formed thereby to be termed accretion. *See Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396 (1892). In the case of *Kinkead v. Turgeon*, 109 N.W. 744 (1906), *vacating* 74 Neb. 573, 104 N.W. 1061 (1905), the Nebraska Supreme Court discussed the vagaries of the Missouri River, and the following language of the *Kinkead* Court demonstrates that the amount of time involved in a river's change does not control the decision of whether the change was.accretive or avulsive:

> It is a matter of public knowledge of which the court will take judical notice that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous;

> that sometimes during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa or Missouri. (Citations omitted.) 109 N.W. at 146.

Thus it may be said that, under Nebraska law pertaining to the Missouri River, the fact that a change in the channel and bank of the Missouri River has not taken place gradually in terms of an extended period of time does not dictate a finding that the change has not been wrought by an accretion. A case in point is *Conkey v. Knudson*, 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N.W. 2d 290 (1942). *Conkey* involved a dispute among riparian claimants over land created when the Missouri River had, in the area in question, moved its channel over a mile north and east of its former location during a single high water period caused by a large ice jam. The trial court had determined that an accretion had taken place. In the first appeal the Nebraska Supreme Court concluded that the determination of accretion was error, noting that the change:

> . . . was not gradual and imperceptible, but definite, sudden and certain as to time and extent. 4 N.W. 2d at 301.

In the first appeal the Court was so certain of its conclusion that an accretion had not taken place that it termed this conclusion as supported beyond a reasonable doubt by the

evidence. 4 N.W. 2d at 295. Upon rehearing, the Nebraska Supreme Court reversed itself and vacated its former opinion. 8 N.W. 2d 538 (1943). In its re-examination of the case, the Court considered evidence that the vegetation in the area in question had grown there only since the change had taken place. The Court noted that the evidence tended to support a finding of either an accretion or a reliction, since

> The record does not disclose from what land, if any, the area was cut off by avulsion, or the situation existing from which it might be reasonably inferred that it could be identified as the same land that had washed away from some other survey tract or plot marked out on the river. 8 N.W. 2d at 541.

The Court further stated that the fact that the river had sought an entirely new channel as the waters receded from the flood did not rebut the conclusion that an accretion had occurred. Finally, the Court noted that, in cases involving the Missouri River, the transition of former river bed to arable land often takes place more rapidly after an accretion than after an avulsion, because avulsions often leave lakes which may exist for many years in the former channel bed.

One common thread running through the Nebraska cases involving accretions is the requirement that the river have moved its channel and banks through a process of erosion on one bank and deposition of silt and sediment on the opposite bank *See Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937). In other words, the definition of accretion requires that a river, in the process of moving its channel location from one place to another, erode the land between its present and former channels and replace the eroded land with alluvion. In fact, where a river has changed its channel slowly without eroding the land in between, Nebraska does not apply the law of accretion. *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946). *Ecklund* held that

> . . . where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never

> becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. (Quoting *Commissioners of Land Office of Oklahoma v. United States*, 270 F. 110, 113 (8th Cir. 1920) 23 N. W. 2d at 789-790.

Thus, it seems that, while the consistently intoned Nebraska definition of accretion includes the terms "gradual and imperceptible," the process of excavation, or erosion and replacement by silt and sediment from upstream, is actually the linchpin of the application of the law of accretion. The process of accretion may be either rapid or gradual, at least in cases involving the Missouri River.

Nebraska law generally defines avulsion as a sudden departure by a river from its former channel and location in either a newly formed channel or pre-existing slough or high water channel. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). While the key indication of an accretion is erosion, the key indication of an avulsion is that the land which is displaced in relation to the river, or remains while the river displaces itself, can be identified as the same piece of land as existed before the change. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). For example, upon rehearing in *Conkey v. Knudson*, 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N. W. 2d 290 (1942), the Court noted that one of the factors demonstrating that an accretion and not an avulsion had taken place was the absence

of evidence showing that the land in question was identifiable as having remained intact through the substantial change in the channel of the river.

While the factor of time is not controlling in a finding of accretion, Nebraska law recognizes that avulsions are characteristically sudden and rapid in terms of time. *Frank v. Smith,* 138 Neb. 382, 293 N. W. 329 (1970). *Compare State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946).

The Nebraska definition of avulsion often refers to an abandonment of a river's old channel. *e.g. Frank v. Smith,* 138 Neb. 382, 293 N.W. 329 (1940). The use of the term "abandon" implies that, in cases of avulsion, the old channel remains relatively intact and often continues to hold water for several years following the avulsive event. *See Conkey v. Knudson,* 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N.W. 2d 290 (1942). This implication finds further basis in the fact discussed above that accretion is characterized by erosion. In other words, while an accretion would likely destroy the riverbank on the side of the direction to which the river moves, an avulsion is more likely to leave both sides of its banks relatively intact. Of course, where a bank is composed of point bar deposits, or sand and sediment, it may be more difficult to determine whether a bank and adjacent riparian land has remained intact through a change of a river channel. This Court does not mean to imply that movement by accretion, particularly one which occurs rapidly, will not leave behind sloughs or marshes which can be identified as remnants of the former channel. Because river movements, and accompanying scour, erosion and deposition, are not uniform, accretion deposits are not uniform. Therefore the river may not entirely fill in its former channel. *See Rupp v. Kirk,* 231 Iowa 1387, 4 N.W. 2d 264 (1942).

It may be noted that Nebraska law places the burden of persuasion upon one who seeks to quiet title, and that burden requires that the strength of the title of the one seeking to quiet title be shown, rather than weakness in the titles of adverse claimants. *Mitchell v. Beerman,* 175 Neb. 616, 122

350 (1889). The burden is so allocated even though a quiet title action is based on a claim of accretion as against adverse claims of avulsion. *Jones v. Schmidt,* 170 Neb. 351, 102 N.W. 2d 640 (1960). Iowa law, on the other hand, recognizes a strong presumption favoring accretion as opposed to avulsion. *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097 (1915).

Another significant difference between Nebraska and Iowa law which is relevant to this case is that under Iowa law the State of Iowa claims the beds of, and islands within, all navigable rivers within the state. *Holman v. Hodges,* 112 Iowa 714, 84 N.W. 950 (1901). *See also Nebraska v. Iowa,* 406 U.S. 117, 92 S. Ct. 1379, 1382 (1972). Nebraska law, on the other hand, gives a riparian owner title to the center of the main channel. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N.W. 647 (1935). Counsel for Plaintiffs herein make much of this distinction, arguing that Defendants cannot prove title by accretion unless they can demonstrate that the claimed accretion lands were attached to the riparian bank at a point above the ordinary high water mark. *See Dartmouth College v. Rose,* 133 N.W. 2d 687 (1965). However, assuming a failure of Defendants' proof on this point, that failure alone would not assist the Plaintiffs in their quiet title action, since they must demonstrate the strength of their title to prevail, and cannot rely on an alleged weakness in Defendants' title. *See* 65 *Am. Jur.* 2d 207-208, Quieting Title § 78 (1972).[4] Such a failure of proof could at most adversely affect the Defendants' counterclaims to quiet title, upon which Defendants bear the burden of persuasion.

Apart from the differences just discussed, this Court wishes to note that it has researched both federal and Iowa laws of accretion and avulsion, and found that, as to definitions of those terms with repsect to the Missouri River, there are no significant differences among federal, Iowa and

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[4] Thus, it has been stated that a Plaintiff has no interest in land if he himself does not own it, and that whomever the court determines to be the true owner is of no concern to him. Having failed to establish title in himself, he cannot complain of an insufficiency of the evidence upon which the court adjudged title to be in the defendant. (Footnotes omitted.) *Id.* at 208.

Nebraska laws which are relevant to this case. *See Kitteridge v. Ritter*, 151 N.W. 1097 (Iowa 1915); *Wilcox v. Pinney*, 98 N.W. 2d 720 (Iowa 1959); *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396 (1892). Indeed, Nebraska law has relied heavily on federal law in formulating its definitions of accretion and avulsion. *See, e.g. Kinkead v. Turgeon*, 109 N.W. 744 (Neb. 1906), *vacating* 74 Neb. 573, 104 N.W. 1061 (1905); *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901); *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894).

III.

The remaining question to be discussed in this memorandum concerns the allocation of the burden of persuasion. As noted above, generally a claimant, whether a Plaintiff or a counterclaiming Defendant, has the burden of persuasion in a quiet title action as to the strength of his or her own title. At times such a claimant may be aided in overcoming this burden by certain applicable presumptions.

In this case the Defendants urge that Iowa law applies and that consequently their evidence is buttressed by Iowa's presumption in favor of accretion. *See Kitteridge v. Ritter*, 151 N.W. 1097 (Iowa 1915). Because, under the case *Nebraska v. Iowa*, 406 U.S. 117, 92 S. Ct. 1379 (1972) Plaintiffs are entitled to rely on Nebraska law (which does not recognize presumptive accretion) in proving their title, this Court rejects Defendants' arguments on this point and declines to encumber Plaintiffs with the task of rebutting a presumption in favor of accretion.

Plaintiffs likewise contend that their case is assisted by reason of a reallocation of the burden of persuasion. The basis for their argument on this point is 25 U.S.C. § 194, which reads:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a

> presumption of title in himself from the fact of previous ownership.

The above-quoted provision is, by its terms, triggered when an Indian person in a title dispute has offered evidence to show previous possession or ownership of the land in question. In this case, Plaintiffs could make out such a *prima facie* case by establishing that the land now within the Barrett Survey Line of the Blackbird Bend Area is land (or accretions to such land-in-place) left undisturbed and in place through and following an avulsive change of the river channel. If Plaintiffs establish this fact, however, they have not only triggered the application of 25 U.S.C. § 194 but also have proved their entire case and established their right to relief in the form of a decree quieting title. On the other hand, if the land now within the Barrett Survey line is land which has accreted to the Iowa shore as Defendants claim, then the land which the Tribe possessed and owned at the time the Omaha Reservation was established has been washed away and replaced. If the evidence supports a finding that the land in question is accretion land to the Iowa shore, then Defendants have proved their case as well as overcome any burden which 25 U.S.C. § 194 might place upon them. In that event, the land now within the Barrett Survey Line simply would not be the land which the Tribe once possessed and owned, although it would occupy the same location. In short, the question whether 25 U.S.C. § 194 applies in this case is inextricably entwined with the merits.

In this connection, it should be noted that Defendants, or their predecessors in title, remained in continuous undisturbed possession of the land in question for over forty years. The Tribe, on the other hand, acquired peaceful possession only with the entry of a preliminary injunction order June 5, 1975. Prior to 1975 various officials and members of the Tribe had on several occasions attempted to enter and occupy the land in the hope of using the Tribe's sovereign immunity from suit to bar ejectment actions and thus obtain possession of the land. In light of these facts this Court is unwilling to find ~~that~~ the Tribe has had possession of the land of a

sufficient nature and degree to trigger the shift in the burden of persuasion apparently contemplated by 25 U.S.C. § 194.

In summary, this Court concludes that 25 U.S.C. § 194 is not applicable to this case. Even if it were, the proof necessary to trigger it would be the same proof which, by itself, would establish the Tribe's title to the land. Neither the parties nor this Court have been able to locate any directly relevant case authority which construes 25 U.S.C. § 194 in a situation like this. *cf. United States v. Sands*, 94 F. 2d 156 (10th Cir. 1938); *Felix v. Patrick*, 36 F. 457 (8th Cir. 1888), *aff'd* 145 U.S. 317, 12 S. Ct. 862 (1892). Thus, this case appears to be one of first impression. It seems to this Court that an application of 25 U.S.C. § 194 to an accretion-avulsion case such as this would be unreasonable and circuitous in view of the manner in which that application would mesh with the merits.

The practical result of this Court's refusal to apply either the Iowa presumption of accretion or 25 U.S.C. § 194 is as follows: 1) in order to obtain a decree quieting title in them, Plaintiffs have the burden of persuasion as to facts which establish their title; 2) similarly, Defendants bear the burden of persuasion on their counterclaim to quiet title; and 3) failure of either of the two groups of claimants to sustain its burden of proof does not, standing alone, entitle the other side to relief. This Court wishes to state, however, that, after thorough and careful review of the evidence, it is satisfied that its findings of fact are supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion.

APPENDIX K

UNITED STATES OF AMERICA, PLAINTIFF,

v.

Roy Tibbals WILSON et al., Defendants.

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to Act of June 18, 1934 (48 Stat. 984) an amended, Plaintiff,

v.

Harold JACKSON and Otis Peterson and the District Court of Iowa in and for Monona County, Defendants.

OMAHA INDIAN TRIBE, etc., Plaintiffs,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY et al., Defendants.

Nos. C 75-4024, C 75-4026 and C 75-4067.

United States District Court,
N. D. Iowa, W. D.
May 4, 1977.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled actions, consolidated for purposes of trial, as to title to lands within the Barrett Survey Area of the area known as Blackbird Bend, came on for trial in the United States District Court at Sioux City, Iowa, on the 1st day of

November, 1976. From the evidence submitted by the respective parties, and upon the entire record, the Court now makes the following:

FINDINGS OF FACT

I.

Nature of the Action and the Parties

1. These consolidated actions are lawsuits commenced by the United States of America and the Omaha Indian Tribe seeking injunctive relief and a judgment quieting title to land situated in the State of Iowa, Monona County, east of and adjacent to the Missouri River. The defendants are various entities, and individuals, who also claim title to the land in dispute and seek to quiet title in their names. The basic issue, as tried to this Court, involves how the river moved over the span of a century from the mid-1800s to about the mid-1900s, and whether the land herein involved was added to Iowa riparian land by accretion or, whether the river moved by avulsion leaving the original identifiable land in place.

2. United States of America, plaintiff in Civil No.C 75-4024, derives its interest in this litigation as a Trustee for the Omaha Indian Tribe and their reservation lands reserved to the Tribe pursuant to the Treaty of 1854.

3. The Omaha Indian Tribe, plaintiff in Civil Nos. C75-4026 and C75-4067, is a duly organized body corporate, established pursuant to its Constitution and By-laws having been approved by the Secretary of the Interior as provided by law. Pursuant to its Treaty dated the 16th day of March, 1854 (10 Stat. 1043) with the United States of America, there was established the Omaha Indian Reservation in the then territory of Nebraska.

4. In 1867 the said reservation boundary was surveyed for the General Land Office of the United States Government by T.H. Barrett, Surveyor. Barrett meandered the Nebraska, or right bank of the Missouri River where it adjoins the

Omaha Indian Reservation in the course of conducting his survey. The Reservation boundary, as originally established, was the thalweg of the Missouri River. Thus the Barrett Survey lines were not actually the boundary of the Omaha Reservation where it adjoins the River. *See Hardin v. Jordan,* 140 U.S. 371, 11 S. Ct. 808 (1891). The said 1867 General Land Office Survey shows the Blackbird Bend of the Missouri River flowing east, south and west on the north, east and south sides of a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa. The area east of the Iowa-Nebraska 1943 Compact Lines bounded by the said Barrett meander line will be referred to herein as the Barrett Survey. The area including the Barrett Survey Peninsula but extending to the Iowa high bank, north, east and south of the Barrett Survey, will sometimes be referred to as the Blackbird Bend area. These findings and conclusions pertain only to the Barrett Survey Area.

5. Of the numerous defendants in all three lawsuits, the only defendants involved in this trail are those claiming an interest in the approximately 2900 acres within the 1867 Barrett Survey. These defendants are Roy Tibbals Wilson, landowner, RGP Inc., landowner, Otis Peterson, tenant of RGP Inc., Harold Sorenson, landowner, State of Iowa, landowner, and Travelers Insurance Company, mortgagee of RGP Inc. The 1867 Barrett Survey and the location of the defendants' land within that boundary, are set forth in Exhibit T78.

6. The Tribe's pleadings acknowledge that these landowner defendants, or their predecessors in title, have had possession of the disputed real estate for at least 40 years.[1] During this period of time, a substantial portion of the land was cleared of trees, leveled, fenced, drained, roads built, and cultivated. It is now a valuable and productive tract of farm ground, as evidenced by the purchase of 2180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000, approximately 1780 acres of

[1] See paragraphs 30 and 31 of Tribe's Complaint in Civ. C 75-4067.

which is within the Barrett Survey and the subject of this trial.

7. On April 2, 1975 the Omaha Indian Tribe seized possession of the land within the Barrett Survey before institution of this litigation, and up until June 5, 1975 maintained said possession without the approval or consent of any of the defendants herein. On June 5, 1975, Judge McManus granted a preliminary injunction to the Tribe and Government permitting the plaintiff Tribe to continue its occupancy of the land within the Barrett Survey during the pendency of this action and subject to certain accounting requirements pertaining to the crops. Numerous issues and problems relative to this temporary occupancy, the crops, and access rights developed but are not dealt with directly herein and many are hereby rendered moot.

II

Subject Matter of this Trail

8. By the Order of Judge McManus dated April 5, 1976, a portion of the issues and land involved in all three lawsuits was consolidated for this trail. Approximately 8000 acres of land claimed by the Omaha Indian Tribe in C75-4067 and all issues of damages were severed. The severance of the Barrett Survey Area from the other claims of the Omaha Indian Tribe was necessary because the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virture of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trail may be sustainable. This left the 2900 acres within the Barrett Survey as the subject matter of this trial since the dispute over that land is common to all three lawsuits.

9. By the Treaty of March 16, 1854, the Omaha Tribe of Indians ceded to the United States all their lands west of the Missouri River, except for certain lands reserved to the Tribe. Pursuant to this Treaty, the Tribe selected a tract of land known as Blackbird Hills to be the Omaha Indian Reservation, which includes the present day Omaha and Winnebago Reservations. The Reservation was thereby established in May of 1855. The thalweg of the Missouri River was constituted the common boundary between the Omaha Indian Reservations and the State of Iowa.

III.

Claims of the Parties and the Issues

10. The Government in C75-4024 alleges that it holds title in trust for the Omaha Indian Tribe to all those lands now lying within the Barrett Survey, approximately 2900 acres, and extending to the center of the main channel of the Missouri River as it existed when the Reservation was created. From this 2900 acres, however, the Government's Complaint excepts any claim for certain lands allotted to individual members of the Tribe and sold to non-members amounting to approximately 400 acres.[2] The Government seeks a preliminary injunction maintaining the Omaha Tribe and its members in possession of these lands until the case is decided; a judgment quieting title in the United States as Trustee for the Tribe; and, a permanent injunction against the prosecution of state actions by the defendants relating to these lands.

11. The Government's theory is that the land within the Barrett Survey in 1867 was cut off from the rest of the Reservation through avulsions caused by floods on the Missouri River; the avulsive changes which cut through the oxbow bend began shortly after the Barrett Survey in 1867 and occurred at numerous times thereafter up until the 1940s

[2] See Government's Answers to Interrogatories Nos. 1 and 2, executed on March 8, 1976. It should be noted, however, that the Tribe's Complaints do not so except these 400 acres from their claims.

when the river was stabilized; and, that each such major move to the west was a sudden shift, which constituted an avulsive change as distinguished from the slow eating away of the banks through erosion.[3]

12. The Tribe in C75-4026 alleges that it is in peaceful possession of the land within the Barrett Survey; that the United States holds the subject lands in trust for them under the Treaty of 1854; and seeks a stay of certain state district court orders pertaining to the occupancy of the land and a preliminary and permanent injunction maintaining the Tribe in possession. In C75-4067, the Tribe filed suit against numerous defendants claiming title to the entire Blackbird Bend area, some 6000 acres of land, and also claiming two bends in the river to the north containing approximately 5000 additional acres. The Tribe alleges that it holds title to the subject land pursuant to the Treaty of 1854; that the adverse claims of the defendants, who have illegally and wilfully trespassed upon the land for approximately 40 years thereby preventing the Tribe's occupancy, are null and void; and seek essentially a judgment quieting title to all the land in the Tribe, the restoration of possession to it, and damages for $50,000,000 for illegal trespasses.

13. The Tribe's theory is that between the time the Treaty was signed in 1854 and 1867, when Barrett made his survey, the river moved eastward by erosion and added to the size of the meander lobe by accretion. After 1867, the Tribe contends this migration eastward continued until 1875 when the easterly high bank, which is apparent on the land today, was created representing the farthest eastward progression of the river in the Blackbird Bend area. Then, the Tribe further claims that sometime between 1875 and 1879, the river suddenly and perceptibly by avulsion, departed the main channel of 1875 to the 1879 channel to the west permanently severing a substantial acreage of the Reservation from the right or west bank of the Missouri River including a portion of the land within the Barrett Survey, and thereafter the Missouri River flowed within the boundaries of the

[3] See Government's Answer to Interrogatories, Nos. 4, 5 and 11, executed on March 8, 1976.

Reservation. After the claimed avulsion between 1875 and 1879 the Tribe contends the river moved north from the 1867 Barrett Survey line eroding as it proceeded and increasing the size of the Reservation by accretion just as the river did in its easterly movement. The Tribe next asserts between 1908 and 1912, the river reached the northerly high bank, which is also visible on the land today, and sometime thereafter departed by avulsive movement to the south like the claimed avulsion from the easterly high bank. The Tribe, therefore, concludes that these avulsions left Omaha Indian Reservation land in place.[4]

14. The defendants in their Answers deny that the lands involved in these suits are a part of the Omaha Indian Reservation but claim title and the right to possession is theirs and seek a judgment quieting title in their names, along with other injunctive relief, by way of counterclaim. Affirmative defenses are also raised in their Answers based upon the statute of limitations, adverse possession, laches, estoppel, abandonment and acquiescence, and general equitable considerations. The Tribe, however, sought and obtained a summary judgment by Judge McManus on these affirmative defenses before trial and while the defendants still assert their applicability they are, therefore, not in issue at this stage of the proceedings.

15. Defendants' theory is that the land within the Barrett Survey was washed down the river and replaced by new land which accreted to the east or Iowa bank. They contend that the eastern approximately one-half of the Barrett Survey peninsula was a low sandy point in 1867 subject to frequent inundation and easily erodable.[5] After 1852, the meander loop of the River moved eastward until, sometime prior to 1875, it reached its limiting width, and its easternmost position in the locality here in issue. Thereafter, the meander loop commenced a gradual migration to the west and south until by 1879, it had eroded away almost all of the "low sandy point," and had commenced a process of accretion to the

[4] See Tribe's Proposed Findings of Fact and Conclusions of Law executed October 24, 1976.

[5] See Barrett Survey Field Notes, Exhibits T26(d) and (3).

eastern and northern Iowa bank in the areas it had occupied sometime prior to 1875. Accretions were gradually added to the left or Iowa bank of the river and by 1890 a stable land mass had been created and added to the Iowa riparian land. In 1890, the river in the Blackbird Bend area was relatively straight, but the river again started to work itself into a meander bend to the north, which bend then began to migrate downstream in the classic manner through the Blackbird Bend area and the land then situated within the Barrett Survey, until by 1927 the bend had migrated entirely through the area formerly occupied by the 1867 peninsula washing away all the land in its way on the Nebraska or right bank and depositing new land on the Iowa or left bank. Between 1927 to 1943 the river moved westerly to the Iowa-Nebraska 1943 compact line completing the accretions to the Iowa bank which form the subject matter of this lawsuit.

16. The question before this Court for resolution is, therefore, how the river moved between the middle 1800s to the middle 1900s, and specifically whether the land now within the Barrett Survey line was formed as the result of accretions to Iowa riparian land or, alternative, whether it is Omaha Indian Reservation land presently identifiable as being left in place by an avulsion or avulsions.

IV.

Discussion of Evidence and Resulting Findings of Fact on the Merits*

To aid in the task of making Findings of Fact, the Court makes the following discussion of the evidence:

A. INTRODUCTION

It is appropriate at this point to identify the nature of the river with which this case deals. During the period from 1854 until at least the early 1940s the Missouri River can best be described as in a wild and uncontrolled state. As

* All references to the transcript shall be in parenthesis with the transcript page first followed by the line where the testimony may be found.

described by Major C. R. Suter in APPENDIX S, of the annual report of the chief of engineers for 1881 (Exhibit T65; W-XX) on page 1650:

> ". . . Its most salient and striking features are the remarkable impetuosity of its current, and its slope, which is considerable for so large a stream. The rapidity of the current and the general instability of the banks and bed give rise to the excessive turbidity of its waters, which have earned for it the title of the 'Big Muddy.' "

And on page 1651:

> ". . . The April rise is generally the most destructive, for it shows, for a time at least, a tendency to follow the channels developed during the low water season proceeding, and, as a consequence, the banks are attacked with extreme violence. When the June rise comes the bed is in a measure shaped for its reception by the preceding flood, and the water passes off with somewhat less destructive results. Both, however, have sufficient power to produce tremendous effects and bring about the most astonishing changes."

And finally on page 1652:

> ". . . Bank erosion to the extent of 2,000 feet per annum, over long distances, has been noted, and to a greater or less extent it is constantly going on, even during low stages. The enormous amount of material thus precipitated into the river, together with that scoured from the bed, causes the formation of innumerable bars, which, even at high water, obstruct navigation. These bars are constantly in motion, their position and shape changing from day to day. The channels through them are also changing both in depth and location, rendering navigation correspondingly uncertain. Owing to the incessant bank erosion the river is steadily increasing the width between high banks, as the bars which are formed opposite caving shores take time to build up to the general level and are meanwhile liable to be themselves attacked and swept away. The erosion *which usually occurs on*

the upper sides of points causes these points to move bodily downstream. Where the erosion is more rapid than the bar growth below, the point disappears and the river's course is detrimentally straightened . . ." (Emphasis supplied.)

The Missouri River was in this period an alluvial river. This means that flow of the river itself makes the geometry of the channel (2902:4-16). During this period it carried large sediment loads because of the run-off from relatively barren lands adjacent to its boundaries (2903:1-11). These large sediment loads created tremendous erosive power (1498:20). Therefore, the flow itself makes its boundaries and the character of the flow is in turn influenced by the nature of its boundaries (2920-2931). It was a river that can best be described as in a state of constant change and movement except during periods of relatively low flow.

Because of the high quantity of sediment transported by the Missouri River during the period in question, the channel tended to meander or become sinuous, rather than flowing in a straight course (2915:1-12). It is generally accepted as a fact by all of the witnesses that the sinuousity or meanders of the river likewise tended to migrate downstream during the course of various periods in time (900:5; 2076:17; 2574:18-2575:11). Therefore the channel of the river was constantly moving and changing its primary or principal course (1538:14). This resulted in erosion of certain land by the movement of the main channel of the river and deposition of sediment being carried by the waters which usually took place opposite where the erosion occurred (311:23; 839:20; 900:5; 1479:11; 2027:9; 2974:11-2948:4). This oftentimes left certain landforms remaining such as sloughs, bayous, lakes, dunes, sandbars and other topographical irregularities which can be geologically identified. (Exhibits G154 and Exhibit W-8.) Of additional significance is the nature of the soils which can be presently identified today, these soils consisting primarily of medium to fine sands, silts and clay which are not cohesive and easily erodible (2586:25-2587:16). These are the soils which would be typically found in an

alluvial floodplain as being deposited during the course of river migrations.

B. DEFINITION OF TERMS:

This Court has prepared and filed a memorandum opinion which analyzes and discusses the difficult choice of law questions presented in this case, as well as the definition of the terms accretion and avulsion. Reference to that memorandum opinion should be made for complete definitions which this Court has applied in arriving at these findings. However, it may generally be said that the various jurisdictions apply definitions of the processes of accretion and avulsion which are substantially similar. For purposes of clarity in these findings, this Court will apply the following general definitions:

(1) "Accretion" results from a gradual and imperceptible addition to the shoreline by action of the water to which the land is contiguous. The action of the water deposits silt and sediment which becomes accretion land. It may occur slowly or rapidly from the action of the river, but it is additional land which cannot be identified as having existed in its present location prior to a change in the location and course of the river which it abuts. When a river moves its course and location through the process of accretion, it has eroded away one of its banks and made depositions of silt and sediment against the opposite bank. The process of erosion destroys land on the bank opposite the accretion deposits by washing it away. The accretion deposits are at least partly composed of land which has been eroded away upstream, and carried downstream by the river in the form of silt until it is deposited against one of the riverbanks.

(2) "Avulsion" is the sudden shifting of the channel of the river and a body of land must be cut off so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed. It is a sudden and rapid change in the channel of a stream where the old bed is abandoned

and a new bed is formed in such a manner as to not destroy the integrity and identity of the land between the old and the new channels. Thus a primary distinction between accretion and avulsion is that avulsion does not erode away and replace by deposits of silt the land between the old and new channels.

(3) "The high bank" is a presently existing identifiable land feature of a higher elevation than the remainder of the floodplain in Blackbird Bend and represents the most northerly, easterly and southerly erosion by the Missouri River during the period in question in this case.

(4) "The right bank" is the Nebraska or most westerly bank of the river at any given point in time during the period in question.

(5) "The left bank" is the Iowa or most easterly bank of the river at any given point in time during the period in question.

(6) "The thalweg" is the center of the navigable channel of the river at any given time. It is not necessarily the "thread" of the river which is considered to be the line midway between the banks at the ordinary state of the water without regard to the location of the thalweg.

The dispute in this case is almost entirely factual and, to a large extent involves the interpretation of documentary evidence, i.e. maps and supporting documents between the period of 1852 until 1940, inasmuch as most of the witnesses living during that time have died. Only a few witnesses were still alive who observed the river in the early 1900s. Therefore, it becomes necessary to detail the evidence available during certain periods of time in order to resolve the conflicts as between the claims of the plaintiffs and those of the defendants.

C. THE MISSOURI RIVER BETWEEN 1852 AND 1879.

1. *1852-1867.* This period of time in history is of limited significance to the Court. The information that can be gleaned from the surveys and maps made during that period is

somewhat limited. Since the instant case involves only title to land within the 1867 Barrett Survey, the actions and locations of the Missouri River within the period 1852 and 1867 have not created or caused a boundary dispute. Thus a discussion of the information between 1852 and 1867 is useful for purposes of background only. The first known survey was a left bank survey in 1852 by Deputy Surveyor Anderson of the General Land Office (Exhibit T22a-g). In 1855, following the treaty with the Omaha Tribe, Deputy Surveyor Barnum, General Land Officer surveyed the boundary of the Omaha Indian Reservation (Exhibit T8 and T8a). Neither Anderson nor Barnum surveyed the river or the opposite bank of the river in 1852 or 1855. In 1855 and 1856 a reconnaisance map of the river was prepared by Lieutenant G. K. Warren (Exhibit T23). In 1857 and 1858 a "tie" survey as between Iowa and Nebraska was performed by General Land Office Deputy Surveyors Hopkins and Haddock (Exhibits T25 and T25a-c, and Exhibit W-E3). In 1867 General Land Office Deputy Surveyor Barrett surveyed the right bank of the river (Exhibit T26, T26a, W-G3, H3 and I3). Once again this survey provides no information as to the left bank at that time or the width of the channel of the river at the time that survey was made. The Barrett survey was conducted during the months of April and May. In the area in question the Barrett line is only a meander line following the outline of the bank of the river as it existed during April and May of 1867. As noted above, it did not purport to establish the boundary of the Reservation in the area in question, since the boundary was the thalweg of the river. *See Harden v. Jordan,* 140 U.S. 371, 11 S. Ct. 808 (1891). Nevertheless, the location of the Barrett meander line can be established, and thus the line provides the only clearly marked line which can be used by a fact-finder as a basis to adjudicate boundary disputes. In fact, the Barrett line was used by the Court to limit and define the area of which the Tribe was granted possession in the preliminary injunction of June 5, 1975. For these reasons, and the procedural dilemma created by the fact of the Tribe's possession of the Barrett Survey Area discussed above, the trial of

this case was limited to the Barrett Survey Area, and these findings and conclusions are also so limited. During that same year and after the Barrett survey, a map of the Missouri River was made by Colonel J. N. Macomb (Exhibit T27). The Macomb map was compiled from sketches by Captain C. W. Howell of the Corps of Engineers and by Missouri River pilots and others. Exhibit T95 is a composite map showing the Barrett survey of 1867 and the Macomb map readjusted by the witness Clark to fit the survey by Barrett. Plaintiffs concede by their testimony that the measurements are not accurate as far as distances on the Macomb map are concerned (210:23) and therefore the reliability of the composite Exhibit 95 is subject to some question. The defendants take these same maps and by the use of mylar overlays superimpose them upon a base map of the Blackbird Bend area (Exhibits W-P7, R7, S7, T7, U7, and V7). The obvious differences between the adjustments made by the plaintiffs on Exhibit 95 and the defendants' mylars makes it impossible for the Court to reconcile the correctness of the interpretation of either side. Since this case is only concerned with the Barrett Survey Area, and since there is no dispute that the river was east of the Barrett line, disputes over the precise location of the Missouri River channel and thalweg as of 1867 have little significance in this case. The admitted distance inaccuracies on the Macomb map by the plaintiffs likewise makes their composite Exhibit 95 somewhat suspect in the mind of the Court. Therefore, the only real conclusion that the Court can make about the movement of the river between 1852 and 1867 is that there has been an eastward migration of the right bank back meander lobe during this period of time with the river eroding against the left bank and accretion taking place on the easterly tip of the meander lobe as surveyed by Barrett. This is evident from the "low sandy point" as shown on the Barrett survey which encompasses about the eastern mile or more of the meander lobe. Barrett's field notes (Exhibit T26E) indicates this is an area which is very low and sandy and subject to frequent inunda-

tion.[6] It is significant to note at this juncture that the expert witnesses produced in the trial of this case almost unanimously agreed that accretion land will form originally as point or middle bars; these bars are low and sandy, unstable, vegetation free and when subject to inundation are easily erodible (824:13; 844:7; 2586:25-2686:16; 2017:17).

That the easterly end of the Barrett meander lobe as surveyed was accretion is not seriously disputed by anyone. The maps and the evidence likewise reflect that during the period from 1852 until 1867 there was some southerly migration by the river which, under normal circumstances, would result in formation of some accretion on the opposite or northerly side of the river which would be accretion to the left bank (311:23; 839:20; 900:5; 1479:11; 974:14).

2. *1867-1875.* In the nine-year period between 1867 and 1875 there are no maps or surveys introduced in evidence which show the location or movement of the river during that period. However, from the Onawa Iowa Public Library there was introduced in evidence an historical atlas printed by A. T. Andreas in 1875 which purports to show the left bank of the river at or about that time (Exhibits T28 and W-L13). The reliability of the date and the accuracy of the atlas are questionable in view of the lack of information as to the source from which the atlas was made and the date of said source. It is apparent that during the period between 1852 and 1875 the river did move easterly, eroding the Iowa or left bank as it moved. Because this case is limited to the Barrett Survey Area, this Court will make no effort to pinpoint the location of the river during this period, and makes only a general finding that the river had moved to some point east

[6] Barrett Field Notes, General Description, Exhibit T26E, P. 520: "Fractional Township 29 N. R. 11 East the 6th Principal Meridian, is a low, sandy point, subject to frequent inundations from the Missouri River. Except a few small cotton wood trees and some willows, there is almost no vegetation upon it. The Missouri River is constantly changing its banks, so that no permanent corners can be established near the water; indeed, except where there are bearing trees, none of the corners in this Township will probably remain longer than the first high freshet in the Missouri. Small quantities of coal were deposited in the several mounds as per instructions, but the sandy soil will not prevent it from being washed away."

of the Barrett line during the years 1852 to 1875 by the process of erosion and accretion.

3. *1875-1879.* This then sets the stage for the first area of principal dispute as between the parties. In 1879 the Missouri River Commission (forerunner to the U.S. Corps of Engineers) surveyed the Missouri River in the Blackbird Bend area (Exhibits T29, W-M3 and W-N3). Careful examination of the original survey maps shows the river width within the Barrett Survey at that time to be about 10,000 feet in width when measured from east-west. The 1879 map shows a crescent shaped bar immediately west of the easterly high bank which has been labeled on some of the exhibits as bar "A" (Exhibit W-N3). Westerly thereof is another crescent shaped bar which has been labeled as bar "B". The map makers have indicated by a common map making symbol that there is some willow vegetation on bar "A" but bar "B" appears on the map as simply a vegetation-free sandbar. Immediately west of bar "B" is a small "tear-shaped" bar which has been labeled as bar "C"—the map shows this bar has willows growing thereon. North and west of bars "B" and "C" is a series of sandbars which have been variously described by witnesses as having the appearance of a "fish-bone"—these bars, like bar "B" are likewise vegetation-free.

It is the claim of the plaintiffs that between 1875 and 1879 the river was flowing against the easterly high bank and that between 1875 and 1879 an avulsion or avulsions took place and that the river abandoned its 1875 bed and by one, or two or more avulsions (291:17-Clark); or by one avulsion, probably in 1879 before June, 1879 (1161:9-14-Robinson); or by several major jumps (1502:8-McQuivey), and established its bed in the 1879 position.

The defendants on the other hand claim that the river moved after 1867 to its 1879 position by gradual erosion south and westward against the meander lobe as surveyed by Barrett in 1867 with deposition occurring on the opposite side of the erosion resulting in the formation of bar "A" as an accretion bar joined to the Iowa riparian land in Section 29, Township 84 North, Range 46 West and becoming later

attached to the Iowa riparian land in Sections 28 and 34, in Township 84 North, Range 46 West (2603:13-2604:23; 2939:4-2944:5). The defendants point to certain facts to support their claims which the Court believes are relevant and logical:

(a) The vegetation on bar "A" as shown by the exhibits is willows. Willows are the first vegetation to appear as sandbars are formed because they will grow on sandbars that are subject to frequent inundation whereas cottonwoods need higher and drier land before growth is established. Willows will start to grow within one to two years after the bar surfaces (1390:20). This indicates therefore that bar "A" was of fairly recent origin and was not land in place left as the result of a sudden avulsive movement by the river. No witness for the plaintiff claims that any part of bar "A" is presently identifiable as land which was left in place following an avulsion (1660:20-1661:20; 1020:12-1022:10).

(b) Plaintiffs theorize that in 1875 the river was flowing against its easternmost bank, and was at that time a channel more than 800 feet wide. *Omaha Indian Tribe's Proposed Findings of Fact and Conclusions of Law, 38, Finding* No. 19. They further theorize that, in 1875, the river abandoned this 800 foot wide channel in an avulsion. *Id. at 39, Finding No. 22, et seq.* Yet Tribe's Exhibit 99 locates bar "A" at a distance of much less than 800 feet from the easterly bank depicted there. This inconsistency supports this Court's finding that bar "A" is not "land-in-place" which was, prior to the 1879 river change, a part of the Blackbird peninsula on the Nebraska side of the river. Bar "A" as mapped in 1879 by the Missouri River Commission appears to be entirely composed of sand and willows. A remnant chute channel is shown on the exhibits as existing between bar "A" and the easterly high bank. The plaintiffs acknowledge that the width of that channel remnant is too narrow to be the width of the 1875 Missouri River channel. It is a common phenomenon, as described by the witnesses, that when a river moves away from its previous channel

by the process of erosion of a point bar that it will close up the old previously existing channel at the upper end leaving a remnant chute (2179:8), (known locally as the "Iowa Chute") such as that found adjacent to bar "A" on the east.[7]

(c) Bar "B" is not identifiable land in place because it is barren of vegetation and therefore is obviously a middle sand bar which has recently formed during the westerly movement of the river between 1867 and 1879.

(d) Like bar "A". bar "C" has willow vegetation growing on it. Willows are the first vegetation to grow as waters recede (1390:20). Thus the mere existence of willows on bar "C" does not, standing alone, support a finding that bar "C" was left in place through an avulsion. The only other evidence that bar "C" is land-in-place is the fact that the 1879 maps locate bar "C" in the northeast corner of Section 19, Range 11 east, Township 24 north. This location is within the Barrett Survey line and was on the Nebraska side of the river. From its review of the evidence, however, this Court finds that the land which had been located in the northeast corner of Section 19, Range 11 east, Township 84 north had been eroded away at some time prior to the 1879 Missouri River Commission map, and further finds that bar "C" is a middle bar which formed on that location as the river migrated west. Bar "C" had, by 1879, existed long enough to support willow growth. In this connection, it should be noted that, by 1890, the area in the northeast corner of Section 19, Range 11 east, Township 84 north,

[7] Judge George Prichard Testimony: "We called those the Iowa Slough. Always along the Iowa bank when these places formed, when the sandbars formed in the river, the water runs on both sides for a while. Then eventually up at the north end then the other side there would be a slough along the Iowa side. The main channel would usually work west. Then the upper end of the Iowa slough would close up. Low water or fill up, I don't know which. Then eventually the whole thing would close up. Although in this particular locality, English Bayou, which was below a mile or two, it stayed open after 1940, I know" (2430:11). "Q: Was this closing up of the Iowa chute at the upstream end a common occurrence from your observations as you hunted along the river? A: In my opinion that's the way they always formed. Q: From your observations? A: Yes." (2442:7).

bears no vegetation which is described on maps as being different from vegetation on other areas in the surrounding land mass which had formed by 1890. (See Tribe's Exhibit 101.) If bar "C" were land-in-place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890.

(e) Bar "D" cannot be identified as being land in place which existed at the time the meander lobe was surveyed by Barrett because those bars are likewise middle sandbars only and being barren of vegetation are therefore forming behind the southerly and westerly migration of the river as it moves to the southwest depositing accretion material on the opposite side of the channel during the course of its movement (2587:17-2589:13; 2948:5-2949:12).

(f) The shape, location, position and condition of bars "A", "B", "C" and "D" are consistent with the gradual southwesterly movement of the river away from an easterly high bank; a movement of that sort would erode away the meander lobe as surveyed by Barrett in 1867; such a movement would likewise deposit accretion on the side of the river opposite the erosion which is exactly what is seen in bars "A", "B", "C" and "D".[8]

(g) Of remarkable similarity, are the experiments of Captain Friedkin (Exhibit zz) which show the process by which accretion to the riparian land is formed by the meandering of alluvial rivers such as the Missouri.[9]

(h) Between 1867 and 1879 the meander lobe was low and at times entirely under the surface of the moving river. The Friedkin experiments and the hydrologic

[8] Testimony of Dr. George Hallberg: "My opinion on those bars is very similar to what I have described for the formation of bar A. As the main channel of the river has shifted from the high back to the west and to the south, we have in essence what I have been describing, back filling behind it in this area of low energy environment. Just as we have built bar A down in this point off in this direction, we have continued to build these bars down" (2604:16-23).

[9] See Exhibit zz, Plates 22, 53 and 61.

experience shows that during high water flows, the river will flow and erode against the upper side of the point bar as revealed by Major Suter (Exhibit XX, P. 1652). Therefore the main channel begins to move against the lobe eroding the same (2934:21-2937:7). As the lobe erodes, the channel migrates to the south and west. As the channel moves over the area where the lobe had existed, it removes remaining portions of the lobe by scouring itself a new channel. In other words, this shift in the course of the river is a consequence of progressive scour and deposition (the scour occurring against the meander lobe and the deposition occurring on the opposite side of the channel from where the scour occurs.) The logical result of this deposition is the formation of bar "A" as shown on Exhibit W-N3.[10]

FINDINGS BY THE COURT—1852-1879

The plaintiffs base their case on the testimony of Mr. Clark, Dr. Robinson and Dr. McQuivey as to the movement of the river between 1875 and 1879. Their testimony in this regard is very vague and oftentimes uncertain. Mr. Clark simply recites that it is his opinion that between 1875 and 1879 the river by series of movements changed its channel from the 1875 position against the easterly high bank to its 1879 position as shown by the Missouri River Commission mapping (291:17). Although he doesn't know when (612:17-23). Dr. Robinson is inconsistent with Mr. Clark in this

[10] Testimony of Dr. John F. Kennedy: "Q. The question essentially is what's your opinion as to how bar A, as is shown on Exhibit N-3, and during the recess we put up U because it has the thalweg soundings on it. How was that formed during the period between 1875 and 1879?" (2947:11-15). "THE WITNESS: All right. I have testified that it is my judgment that this whole convex bar had been obliterated during this period of high flows that occurred in four years between '75 and '79. Now, as the channel progressively moved to the west and with the thalweg, shifting westward, this would become a river of diminished velocity, a slack water area or area of lowest velocity. Consequently, sediment that gets into this area would tend to be deposited because of the diminished sediment transport capacity of the water flowing in this area. Additionally, when this was all inundated there would be moving through it here an ensemble, of very large sand waves or sand dunes." (2947:19-2948:7).

regard inasmuch as Dr. Robinson thinks that the sudden avulsive movement as he described it occurred in 1879, before June (1161:9-14). Dr. McQuivey contradicts this by concluding that there were "several major jumps" (1502:8). A careful examination of the testimony and the mapping done in 1879 leaves little doubt in the mind of the Court but what Dr. Robinson is in error in his conclusions. If the avulsion had occurred in 1879 as Dr. Robinson opines, then it would be impossible for willows to be growing on bar "A", because the willows are growing at a place where the channel would have to have been flowing (1152:20). Obviously those willows growing along the easterly end of bar "A" would have been in the 1879 channel prior to the avulsion. Therefore for the willows to be growing at that place as mapped by the 1879 Missouri River Commission would be an impossibility as even willows don't grow that fast. The testimony of Mr. Clark is likewise inconclusive. Elmer Clark is a surveyor with considerable experience, but he is neither a geologist nor a hydrologist (747:22).

On the other hand the testimony of Doctors Hallberg and Kennedy is extremely persuasive (2939:4-2944:18; 2567:18-2568:10; 2571:12-2576:13). Both are highly qualified, both educationally and by experience in their field and with the Missouri River. Their testimony is more clear and convincing to the Court and the most probable in the light of reason, common experience and the other evidence in the case. Their testimony is adequately supported by the testimony of Raymond Huber whose practical knowledge and expertise was gained by 37 years during which he traveled, studied and engineered the control of the wild and untamed Missouri River.

It is therefore the Finding By The Court that between 1852 and 1879 the Missouri River moved to its easternmost position at a point east of and outside of the Barrett Survey Area. Having reached that most easterly location, the river, by a gradual progression during periods of high flow commenced a southerly and westerly mirgration away from the easterly high bank (2606:6-25). This caused the old channel against the easterly high bank to close at its upstream end by

the process of deposition and siltation leaving a remnant of the old channel against the easterly high bank such as has been described by Judge Prichard (see footnote 7, supra). As the river moved in a gradual progression to the south and west it was eroding against the meander lobe as surveyed by Barrett in 1867 destroying and entirely washing the land surveyed by Barrett down the river (2955:17-2956:19). Deposition of silt, sands, and gravels (described by plaintiffs' counsel as "alluvion") was occurring during this process. This resulted in additions of new land to the left bank which new land was beyond the power of identification. It was in fact accretion to the Iowa riparian landowners in Sections 29, 28, 34, 33 and 32 in Township 84 North, Range 46 West (2951:3-2952:15).

As a consequence by 1879 the action of the Missouri River had completely obliterated and washed away the meander lobe as surveyed by Barrett to almost the westerly edge of Iowa Sections 29 and 32 in Township 84 North, Range 46 West, as well as the lands surveyed by Barrett which fall within Iowa Sections 28 and 33 of Township 84 North, Range 46 West. As a consequence the Court finds that the claims by the plaintiffs that any lands within Iowa Sections 28, 29, 32 and 33, Township 84 North, Range 46 West as being identifiable land in place as the result of an avulsion between 1875 and 1879 are not substantiated by the greater weight of the evidence. The Court finds by a preponderance of the evidence, that in 1879 any lands lying within Iowa Sections 28, 29, 32 and 33, Township 84 North, Range 46 West as surveyed by Barrett were new lands added by the process of erosion and accretion to the shoreline and were not identifiable as land which remained in place through the river movements and were accretion land to the Iowa riparian owners.

D. THE MISSOURI RIVER BETWEEN 1879 AND 1890

1. *1881.* It is conceded by all of the witnesses that in 1881 a flood occurred on the Missouri River which recorded the highest flood waters of any time since reliable records have been kept (Exhibit T97 and T104; Exhibit G124). In

fact, Exhibit T97 reveals that the 1881 flood waters were ten feet higher than the June 16-20, 1879 water level (606:1-7). However, no maps were made of the Missouri River in the Blackbird Bend area between 1879 and 1890. Therefore, the effect upon the landscape in the Blackbird Bend area by virtue of the tremendous force of the 1881 flood is factually unknown. There is testimony, however, that during periods of high water flows, the river channel tends to straighten which will modify the channel configuration (1507:22; 2951:13-17). Following a flood of this magnitude the channel then begins to seek a new equilibrium and to consolidate its course (2959:8-15). Changes in the channel upstream from the Blackbird Bend area likewise are of considerable significance during this period of time (1508:10).

In 1890, the Missouri River Commission again mapped the channel as shown by Exhibits W-P3, T32 and T101. The mylar overlay, Exhibit W-Y7 when overlaid on W-X7 shows that the course of the river after 1879 and by 1890 has in fact straightened somewhat and has moved by migration somewhat to the north and to the east of its 1879 position. All parties agree that this northeasterly movement would be by erosion against the left bank with some accretion deposition occurring on the right bank.

There is however a very significant feature on the 1890 Missouri River Commission map which must not, at this point, be overlooked. The map clearly shows that lands located with Sections 28, 29, 32 and 33 in Township 84 North, Range 46 West, which had previously been within lands surveyed by Barrett in 1867 are now solidified and vegetated accretion land to the left bank Iowa riparian owners (Exhibit W-P3). This simply shows the normal and logical progression of the accretion which was shown to be forming in 1879 when the river was then mapped by the Missouri River Commission.

A thorough examination of Exhibit W-P3 which is a scale copy of the 1890 Missouri River Commission map with the Barrett survey line superimposed thereon shows a material change in the upstream channel from Blackbird Bend (Mc-

Quivey 1508:10 & 1538:20). It shows the formation of a bend upstream which is similar in shape to the Barrett survey meander but not nearly as large in size. A long westerly oxbow on the approach of Blackbird Bend indicates erosion against the right bank and deposition in the form of a point bar on the left bank. Two other land features are shown which have been identified as being left as the result of the avulsive action of the river (2589:2-13). These are Blue Lake shown to the east of the Blackbird Bend and which was formed before 1852 (2827:17) and an old riverbed "cutoff 1875" which lies southerly of Blackbird Bend and which has been referred to in the evidence as Lake Quinnebaugh. The significance of these two features bears discussion (2593:18-2594:6). Recall the plaintiffs' claim that between 1875 and 1879 an avulsion occurred when the river allegedly left the easterly high bank and moved to its 1879 position as shown by the Missouri River Commission map. However, an examination of the land features in Blackbird Bend reveals that the land features are strikingly dissimilar to Blue Lake and Lake Quinnebaugh (2594:7-10; 2595:8-19). Those features indicate that when an avulsion occurred in the areas of Blue Lake and Lake Quinnebaugh it left the then river channel in substantially its then width, depth, shape and position. This formed an oxbow lake of significant size and depth. Had such an occurrence taken place between 1875 and 1879, as alleged by the plaintiffs, it is the Court's opinion that a similar land feature should have likewise remained and would have been so mapped in 1879. The absence of such a land feature is substantial evidence in the mind of the court that an avulsion did not take place between 1875 and 1879 in Blackbird Bend as alleged by the plaintiffs. Likewise the condition of the land in 1890 in Sections 28, 29, 32, and 33, Township 84 North, Range 46 West shows it to be covered with vegetation and trees and has by that time become all accretion to the Iowa riparian owners in Iowa Sections 28, 29, 32, 33, and 34, Township 84 North, Range 46 West.

E. MISSOURI RIVER BETWEEN 1890 AND 1912

The evidence is somewhat uncertain as to the movement of the river between 1890 and 1912. There is an 1894 Monona County Survey of the left bank which is of some assistance as to the left bank of the river (Exhibit U-3). This

does show a continued northeasterly migration of the left bank of the river which is consistent with the position of the river in 1890. The 1894 county survey shows the left bank in approximately the same location as shown by the Missouri River Commission in 1890, but an accretion bar has formed which is strikingly similar to bar "A", as shown on the 1879 map. There is a 1900 plat of accretions made by Monona County Surveyor R. S. Fessenden which is received in evidence (Exhibit Z-3). The 1900 Monona County surveyor shows accretions to government lots in Sections 28 and 33, Township 84 North, Range 46 West in Monona County, Iowa, and is recorded on January 23, 1901 in the office of the Monona County Recorder. Exhibit U-8 is an overlay of the 1900 Fessenden survey, Exhibit Z-3, showing the continued westerly movement of the accretions lands as shown by the 1890 survey.

An atlas map, published by the George A. Ogle Company in 1906, is received in evidence as Exhibit D-4, and the Tribe composite made from that map has been received in evidence as Exhibit T-102. This indicates some additional north and east migration of the left bank of the river but is of little assistance to the court as to the location of the right bank during this period. These are the only maps between 1890 and 1912. However, the general course of the river during this time indicates the development of a pattern which is somewhat similar to the easterly migration of the river during the period between 1852 and 1867. The river is meandering further north than it had in 1867, but not as far to the east (2639-2640). There is some erosion into the accretion which had previously formed adjacent to the Iowa left bank riparian owners (2642:22-2643:12).

F. THE MISSOURI RIVER BETWEEN 1912-1923.

In 1912 a left bank survey was accomplished by surveyors Fairchild and Oliver. This original survey has been received in evidence as Exhibit Q-8. Payment for this survey was authorized by the Monona County Board of Supervisors on March 5, 1912 as evidenced by Exhibit H-4. It was a survey

of the Monona County west boundary, or as described by the minutes of the County Board of Supervisors, the "Missouri River Line". An examination of the exhibit leads to the obvious conclusion that it is the original survey map as made by surveyors Fairchild and Oliver upon which have been superimposed some Lewis and Clark camp sites by historian Mitchell Vincent (See, Exhibits T71 and T72).

The significance of the Fairchild survey (as it is referred to in the evidence) is two-fold. First, it shows the 1912 water line on the Iowa side of the river as surveyed by Mr. Fairchild. Secondly, in partial Section 24 and 25 of Township 84 North, Range 47 West and in partial Sections 19 and 30 of Township 84 North, Range 46 West it shows the development of a sandbar of rather substantial size which is obviously a point bar that has begun to develop by virtue of a change in the course of the upstream channel of the river (2650:6-2652:13). Because of the angle of the river channel upstream from the area where the Fairchild Survey map locates the Sandbar (See Tribe's Exhibits 102, 103), the river would have been eroding the right or Nebraska bank at a point upstream from the sandbar. This erosion would, according to the expert testimony, be very likely to deposit sand in the area depicted as sandbar in the Fairchild map. The formation of this bar began to occur sometime after 1894 and before the time of the 1912 Fairchild survey. The authenticity of the sandbar as shown on the Fairchild survey is challenged by the plaintiffs. They imply that the bar was mapped by someone other than Fairchild (perhaps Mitchell Vincent) or that the map was in some manner "doctored" either by the defendants or someone on their behalf (3143:12). A careful examination of the exhibit, together with other evidence and expert testimony as to the behavior of the Missouri River, leads the court to the conclusion that this exhibit is authentic and of assistance to the court. The defendants introduce in evidence Exhibits A through P. These exhibits are a series of letters from the Omaha Indian Reservation Agency Superintendent to the Commissioner of Indian Affairs during the period from 1907 and continuing until 1922. Thus, while they were not written by hydrologists they are accounts of the river's

behavior which were prepared at a time when few reliable maps of an official nature are available, and are based on actual observation. They deal with the request by certain Indians of the Omaha Tribe or their heirs requesting that their allotments which had previously been granted to them of lands within the Omaha Indian Reservation be exchanged for new allotments. The reasons stated for the exchange requests were that the land originally allotted to the allottees was or had been washed away by the Missouri River. To better understand the relationship of these allotments and the relationship of the allotment exchange letters previously referred to, the court has examined Exhibit T80. The area in orange shown on Exhibit T80 is land which has never been allotted to any member of the Omaha Tribe and has never been patented by the United States Government to anyone; the area in green represents allotments which have been relinquished and are directly related to Exhibits A through P; the crosshatched areas are lands which have been sold or otherwise left their trust status after the 1854 Treaty.

The Plaintiffs disregard and disavow any significance to the allotment exchange letters (Exhibits A through P) (1135:18-1136:14) and assert that the verbiage used in the allotment exchange letters describing the action of the Missouri River as "washing away" the allotment lands is only the description of a nonprofessional person, unfamiliar with the action of the river. They conclude that the land was not "washed away" as described in the letters, but rather simply inundated by high water flows during stages when the river was in flood. The defendants on the other hand relate the allotment exchange letters to the formation of the sandbar as shown by Fairchild in his 1912 survey. Exhibit F-4 was prepared by witness Huber, from the information contained in Exhibits A through P, S and T19. Mr. Huber then reconstructs what he believed to be the location of the right bank of the river in 1912 (2054:22-2059:7) in order that the right bank position might be compared with the location and position of the sandbar as shown by Fairchild. This reveals that the right bank, as reconstructed by Huber is consistent with the Fairchild sandbar. In support thereof, defendants,

also introduce a sketch of the 1907 and 1908 river by one Thomas R. Ashley and a letter from the Superintendent of the Omaha Agency to the Commissioner of Indian Affairs enclosing a copy thereof which is dated October 23, 1908 (Exhibit R). The Ashley sketch and the letter to which it is attached describes the action of the Missouri River during that period as it relates to lands which are now located in Sections 24, 25, and 36 of Township 83 North, Range 47 West. The sketch of Mr. Ashley indicates that the river during that period is migrating in a southerly direction eroding against the right bank of the river washing away Indian allotment land and producing deposition of the left bank which is accretion to the Iowa riparian owners. Of some significance in this regard is also an Omaha Reservation Plat made by Reservation Farmer Corney O. Preston which is dated in May, 1914 and received in evidence as Exhibits I-4 and J-4. The witness Huber then prepared Exhibit L-4 which is a composite map showing the Fairchild survey as shown in Exhibit Q with the right bank line from the Preston plat (Exhibit I-4) and a reconstruction of a plat showing the allotted lands reportedly eroded away from the letters Exhibits A through P, as shown by Exhibit F-4 (2063:2-2064:7). The end result of all this tends to show the authenticity and reliability of the allotment exchange letters as they relate to the action of the Missouri River during this period of time.

In the light of the Indian allotment exchange letters, the Preston map and the Ashley sketches, the sandbar shown on the Fairchild 1912 survey becomes increasingly significant. It is the position of the plaintiffs in this case that the river was against the northerly highbank in about 1912. The witness Clark is of the opinion that the river left the northerly high bank in a sudden noticeable movement by one or more avulsions to reach its position in 1923 (455:7 and 524:19), however, he doesn't know how many (639:11) and he could find no records (779:20). He comes to this opinion because of the fact that there are sloughs running next to the northerly high bank which are the remains of the 1912 main channel. The sloughs to which Mr. Clark makes reference are primarily in Sections 19, 20, 28 and 33 in Township 84 North, Range

46 West. The remnants of these sloughs are evident on the ground today. The witness Dr. Robinson is of the opinion that between 1908 and 1916 there were several high water times which produced a change in the river to the south and it moved over toward the Nebraska bluffs and inundated the Barrett survey area and reached its 1923 position. It is his opinion that this occurred suddenly during one high water period (1067:13-1068:16).

Without commenting on the inconsistencies between the opinions of the witnesses Clark and Dr. Robinson, the Court believes that the following evidence contradicts those options:

(a) The slough areas found in Sections 19, 20, 28, 29 and 33 of Township 84 North, Range 46 West are more representative of the so-called "Iowa Chute" than they are evidence of avulsions. As earlier indicated, an avulsion normally leaves a prominent landform remnant such as Blue Lake, which is shown on the 1946-47 Corps of Engineers Sheet #72. (Exhibit U-8); or Badger Lake (Exhibit N-7A) or Lake Quinnenbaugh (Exhibit P-3) (2593:18-2594:6). These lakes, formed by avulsive cut-offs, are sufficiently wide to indicate that they lie in an intact abandoned channel, rather than a remnant of a channel. The Court believes that if an avulsion had occurred between 1912 and 1923 a landform remnant should have remained against the northerly high bank which would bear a reasonable resemblance to the lakes above referred to. The sloughs which remain are considerably more narrow and of less depth than would be evidenced by a sudden channel change which would leave the old river channel in place (2827:13-2828:17).

(b) Exhibit P-8 is an aerial photo mosaic of aerial photographs taken by the Corps of Engineers in 1925. Dr. McQuivey, a river hydrologist testified on behalf of one of the plaintiffs. It was his opinion that this aerial photograph showed evidences of many old channels which developed as the river progressed from the northerly high bank to its 1923 position. It was his opinion that these were main channels at one time. He marked

on said exhibit in red the outlines of the old channels as he saw them (1683:23). His testimony is consistent with that of the witnesses of the defendants who state that after the river moved to the northerly high bank it then began to erode to the south during periods of high water depositing accretion materials to the left or Iowa riparian land as the progression took place (2679:10-2682:11; 2134:24-2139:2; 2967:1-2968:9). This is consistent with the sketch of Mr. Ashley, the Indian allotment exchange letters indicating erosion against the right bank with resultant deposition against the left bank, with the formation of the sandbar as shown by the 1912 Fairchild survey and with the testimony of Judge Prichard who was on the land in 1919 and described it as being all "bar" land with scattered sloughs, lakes, small willows no higher than a horse and a few scattered cottonwood trees 2432:4; 2423:12; 2435:9). It is also consistent with the angle of approach by the upstream channel as is shown by the Fairchild survey (Exhibit Q-8) (2650:6-2652:13).

(c) Plaintiff's witnesses acknowledge that there was an extremely wet cycle from at least 1910 to 1917 or 1918, as shown by the hydrograph prepared by the Witness Clark, as Exhibit T-112 (505:11). Mr. Clark likewise admitted that his Exhibit T-104 shows high water priods substantially above the elevation of 1045 feet in years 1905, 1906, 1912, 1913, 1915, 1916 and 1920. (578:17; 580:10-17). To like effect is the testimony of plaintiff's witness Dr. Robinson (1052:15; 1062:1). The witness, Ross Willey, then age 13, observed the river during the June rise in 1916. He marked on Exhibit M-5 the position along the northerly high bank where he rode on horseback and observed the river (2008:8). He could see out across the main channel and could see the town of Decatur, and between where he sat on horseback and the town, he could see some bayous, water at different spots, weeds, small brush and bare spots where sand blows (2402:7). In 1920, he became aware that Joe Kirk was trying to grow some sweet clover and alfalfa on some of the bare land that was just a little south and west of

the present-day buildings; there were still a lot of sloughs and standing water areas and Kirk was doing a little clearing (2404:23). Kirk continued in possession from 1920 until he sold out to the Petersons and was there every year farming and clearing (2413:25). In 1919, Judge Prichard then a young lawyer, age 25, went on the bar with Joe Kirk in August or September. He marked on Exhibit J-5 the point where he and Kirk crossed the Iowa Chute with saddle horses (2423:3) He describes the area as "new bar land," with lots of small willows, sand dunes and small cottonwoods as big as maybe an inch and a half (2424:5). He saw no indication of any land that could be called land in place, other than the bar land, and no trees except new growth (2424:23). He and Joe Kirk rode over the entire bar looking at the river, and just generally looking over the land. There was water standing in low places (2430:9). He describes the area to the north and west of where they entered the Kirk property as "just sandbar" with little willows and sand dunes and once in a while a patch of cottonwoods that they could ride through without any trouble (2432:4). During this ride with Joe Kirk, he did not see any indication of any trees or land that appeared to him to have been cut off from the Nebraska side of the river. It just looked like "all new bar" to him (2433:12). The whole area looked to him as if it had started building up in the north end and had built gradually southward. It was many years before the southern land built up to that closer to the north high bank (2437:23). He had observed the formation of land in this manner in other bends of the river because his family was interested in similar land called Hedges Bar. He describes the formation as a bar in the river with the water flowing on both sides and then it would close up at the upstream end and leave a kind of old remnant of the channel lying up against the high bank, which was called the Iowa Chute (2440:6). The descriptions of the land by witnesses Willey and Prichard, who have absolutely no interest in the outcome of this litigation, is certainly the only clear picture of the

land as it appeared at that time. If the land had been land in place as indicated by Clark and Dr. Robinson, it would have had more vegetation growing on it and vegetation should have been much taller than is described by the witnesses. The Court can conclude that the land described was formed by the gradual erosion of the river southward from the northerly high bank, with the deposition occurring on the Iowa side of the erosion, leaving sandbars, sloughs, bayous and other landform remnants which are typical of that type of river movement (2079:11). This lay testimony, based on actual observations, is of considerable significance.

(d) Another line of evidence in which the Court places reliance is the matter of the slope and gradient of the land throughout the entire Blackbird Bend area as it exists today. Dr. McQuivey's profiles of the Blackbird Bend area (Exhibit G-154) indicates the slope and gradient of the land as it presently exists to be generally sloping from the west to the east (1620:25). The topographic cross-sections prepared by Dr. Hallberg (Exhibit W-8) reveals that those cross-sections show a general gradient and slope from the northwest to the southeast, so that surface water would drain through the area generally from the northwest to the southwest (2679:10-2682:11). This is consistent with the testimony of Drs. Hallberg and Kennedy, as to the manner in which the river migrated through the entire Blackbird Bend from the time when it reached the northerly high bank after 1890, until it reached its 1923 position, as shown by the Corps of Engineers. It is inconsistent with the therories of Mr. Clark and Dr. Robinson, who claim that the river migrated to the north and east after 1890, eventually reaching the northerly high bank and then jumping suddenly to its 1923 position. If this were in fact the case, as the Court understands the expert testimony, the slope and gradient for the drainage of surface waters should be to the northeast, rather than to the southeast as is indicated by the cross-sections.

This might also be a pertinent place to comment upon an inconsistency which in the Court's mind is of no small significance. It is the plaintiff's claim that whenever the river moved to the east to the easterly high bank and whenever it moved to the north and east to the northerly high bank, that it did so by the process of erosion against the left or Iowa bank, with corresponding accretion deposits to the right or west bank. However, whenever the river moved to the west or to the south, the plaintiffs claim that it did so by a "jumping action" so as to qualify in the eyes of the law as an avulsion. It strikes the Court somewhat strange that the river would move in two directions by erosion and in the two opposite directions by avulsion; in this regard, defendant's have introduced evidence to the contrary (2601:22-2602:15; 2642:22-2643:12). A study of the Corps of Engineers maps from 1923 until as late as 1940 does not indicate to the Court in any manner that the river was "jumping" from one channel to another during that period of time (2967:1-12); and a careful study of the maps reveals that whenever the river moved it always moved by erosion, whether it be east or west, north or south. This factor, coupled with a lack of any substantial evidence that the land was left as identifiable land following a particular movement lends considerable credence to the theory of the defendants while leaving considerable suspicion as to the theory of the plaintiffs.

(e) There is evidence in the record of a cottonwood tree which is 67 years old (1373:25) that was standing alone in Section 24, Township 84 North, Range 47 West. This tree was marked on Exhibit T-101, Exhibit T-105, Q and T-105A. The plaintiffs claim that the age of this tree supports their contention of an avulsion between 1912 and 1923, because if the tree was sixty-seven years old it had to have started growing in about 1908 or 1909; therefore, if the river had moved away from the northerly high bank by erosion, the tree should have been swept away by the action of the river. This assumes that the river was against the high bank in 1912, but there is some

evidence that the river had left the northerly high bank by 1907 or 1908 (Exhibit R—Ashley sketch of 1907 and 1908 rivers). This Court is unwilling, on the evidence, to join in the assumption that the river was at its northernmost position in 1912. It appears that the most that can be said about the northernmost position is that it was reached at some point between 1890 and 1912, but probably prior to 1912. The defendants on the other hand, contend that this tree was growing on the Fairchild sandbar and that explains its age. The location of the tree is marked as red dot surrounded by a circle by the Witness Virtue on Exhibit Q and is shown as being located on the edge of that bar. Plaintiff's witness Clark located the tree at a point 100 feet from the edge of the Fairchild sandbar (Exhibit 105-F). The Court is satisfied that when Fairchild made his survey in 1912, he did not survey the sandbar and, therefore the precise location thereof is not to be assumed from the survey map. This conclusion is supported by the fact that Judge Prichard saw no trees of any size in 1919. It is the Court's opinion that it is more likely that this tree commenced growing on the Fairchild bar than it is that the river moved avulsively as claimed by the plaintiffs. This conclusion is reached because of the fact that the lay and expert testimony most credible to the Court demonstrates that the river's change at this time was erosive and accretive rather than avulsive.

FINDINGS BY THE COURT—1879-1923

The Court therefore concludes from a review of all of the evidence in this case, including the maps which are pertinent to the time period between 1890 and 1923, that the plaintiff's evidence falls far short of the evidence which would be necessary to prove an avulsion or avulsions. To the contrary, the testimony of the defendants' lay and expert witnesses, is the most clear and convincing to the Court's mind. Therefore, for all of the reasons which have heretofore been stated, the Court finds that there were no avulsions in

the Blackbird Bend area between 1890 and 1923, and that the movements of the river during that period of time were erosive in nature so that accretion was being formed on the side of the river opposite the erosion. The Court finds that after 1890 the river moved erosively until it reached what is now the northerly high bank following which it commenced a southern migration throughout the Blackbird Bend area until it reached its 1923 position. This migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners. The Court is satisfied that no other conclusion is tenable from the evidence in this case.

G. THE RIVER FROM 1923 TO 1940

Generally, the witnesses are in agreement as to the interpretation of the Corps of Engineers maps, the first of which was made in 1923, and is in evidence in this case as Exhibits W-04; T-35 and T-105, composite. The 1923 map shows the river running generally in a north-south direction through the westerly end of Blackbird Bend, until it reaches a position in Iowa Section 36, Township 84 North, Range 47 West, when it makes a 90 degree angle turn to the east, where it traverses Iowa Sections 31 and a part of 32, Township 84 North, Range 46 West, whereupon it then turns south again and passes out of the right bank meander as surveyed by Barrett. In view of the conclusions heretofore reached by the Court, the land lying east and north of the river in its 1923 position, has already been determined to be accretion land to the Iowa riparian owners. Therefore, the remaining question as to the migration of the river in this period of time is as to that land still within the Barrett meander survey line, which lies adjacent to the right bank of the 1923 river. Necessarily, an examination must then be made of the river as surveyed by the Corps of Engineers in 1927. The 1927 maps are received in evidence as Exhibits W-S4, T-36, and T-106, composite. It is apparent from an examination of the

exhibits that after 1923 the river moved slightly to the east and then migrated south and west, leaving behind it a large point bar identified on the 1927 maps as "Low Bar". This low bar shows the remnant 1923 or later channel which is mapped by the Corps of Engineers as a "slough". Some other minor channel remnants are seen sticking into the low bar like fingers from the easterly side thereof. By 1927 the Corps has mapped the landforms (i.e., trees, bars, swamps, lakes, etc.) within the entire Blackbird Bend, which was not done by the Corps on its map in 1923. Although plaintiffs' witnesses disagree to some extent with the Corps mapping, the Court is of the opinion that the Corps of Engineers was in a better position in 1927 to verify the accuracy of its mapping than the plaintiffs would be by the current use of photo-interpretation of aerial photos made in 1925. On the 1927 map and east of the former 1923 river is shown large areas of marsh and lake, which the Court believes is further evidence of the southerly migration of the river after 1890. The 1927 map clearly indicates that much of the land was just beginning to develop as accretion to the Iowa riparian owners (2693:12-25; 2702:6-15). The vegetation shown on the 1927 map is likewise consistent with the testimony of Judge Prichard, who had been on the land in 1919. The low bar area shown on the 1927 map, is the beginning of accretion land to the Iowa riparian owners in Sections 32 and 31 of Township 84 North, Range 46 West. The movement of the river between 1923 and 1927 was by erosion against the right bank and accretion deposition to the left bank.

The river from 1927 to 1940 is likewise fairly clearly traced. Private levees were constructed by Joe Kirk and later the Corps of Engineers constructed some pile dikes and an abatis to begin to train the river into its designed alignment. The 1937 reconnaissance map, Exhibit W-B5, shows some of the changes in the condition of the river from its 1930 alignment. These dikes and abatis had the effect of forming accretion to the Iowa riparian land adjacent to the dikes (2093:24). There is no evidence between 1923 until 1940 of any avulsion that occurred through the natural forces of the river or through man-made levees, dikes or abatis (2103:1).

FINDINGS BY THE COURT—1928-1940

Therefore, the Court finds and concludes that all of the land formed to the east of the Missouri River as its channel was located in 1940, was accretion, either natural or man-made to the Iowa riparian landowners.

In 1943, the States of Iowa and Nebraska entered into a Compact Agreement which was based upon the 1940 position of the Missouri River in the Blackbird Bend area (Exhibit W-F5). The compact between the two states concluded once and for all that the land lying easterly of the compact line was located within the State of Iowa and that land lying westerly of the compact line was located within the State of Nebraska. The location of the compact line is not in dispute in this suit and, therefore, the Court must finally conclude that all of the land lying east of the 1943 Iowa-Nebraska compact line is accretion land belonging to the Iowa riparian owners and is not owned by nor subject to claim by the Omaha Indian Tribe, or the United States of America, as Trustee for said tribe under the Treaty of 1854.

Although these factors did not influence the decision of the Court in these findings, the Court feels compelled to comment upon the history of the activities of the defendants and their predecessors as it relates to the Blackbird Bend area. The evidence is without dispute that the Omaha Indian Tribe has not been in either possession or occupancy of the land within the Barrett Survey Meander since 1912 or before. There is considerable evidence in the record that the defendant's predecessor in title, Joe Kirk, came upon the land in approximately 1915 and commenced to clear and farm such areas of it as could be made farmable. From that time forward, the land was in the process of being cleared, drained, leveled, and improved for agricultural purposes by Kirk and others. There is in evidence in this case a certified copy of the Judgment and Decree of Cause No. 10093, District Court of Iowa in and for Monona County, entitled *George D. Whitney v. Joseph A. Kirk and Bertha Kirk*, wherein the Iowa District Court on November 30, 1928, concluded that Joseph A. Kirk was the owner of the Northeast Quarter of

Section 19, Township 84 North, Range 46 West, lying upon the high bank, and that all land lying adjacent thereto was accretion land and as such, Kirk was entitled to title and possession of all lands lying south of a line commencing at the southwest corner of the Northeast Quarter of Section 19, Township 84, Range 46, and running in a southwesterly direction at right angles to the bed of the Missouri River and between said line and a line commencing at the southeast corner of said Northeast Quarter of Section 19 and running south to the bed of the Missouri River (Exhibit W-CC). Although this Court realizes that that judgment and decree is not binding in any way upon the Court at this time, it is simply a further indication, from a different source, assumedly based on the evidence of witnesses at that time, that the land in Blackbird Bend lying southerly of the northerly high bank was formed by the process of accretion. Also in evidence, are Wilson Exhibits AA and BB, which are quiet title actions brought by the defendants or their predecessors in interest, of substantially all of the land with the Barrett Meander Survey, which quieted title to the riparian owners in 1962 and 1963 as against all persons except the United States. Finally, there is evidence in this case Exhibit W-D3 which is the Certificate of the Monona County Treasurer, showing payment of the taxes on the land within the Blackbird Bend by the defendants or their predecessors, since said land was placed upon the tax rolls.

There is no evidence of any possession by the Omaha Indian Tribe or of any improvements to the land by the Omaha Indian Tribe at any time even since temporary possession was granted by this Court by Temporary Injunction in 1975. All of these factors are of significance to the ultimate disposition of this cause as historical facts which have assisted and aided the Court in reaching a final determination.

H. FINDINGS OF FACT ON THE MERITS

From all the evidentiary matters heretofore discussed, the COURT FINDS:

(1) That the movement of the river from its 1867 position to its 1879 position was by gradual erosion

against the banks of the river resulting in accretion deposition opposite the erosion; that there is no clear and convincing evidence of an avulsion during that time period which left land which could then or can now be identified as land in place.

(2) That after 1879, the river moved erosively until it reached the present northerly and easterly high bank, sometime after 1890.

(3) That after reaching the northerly and easterly high bank, the river then commenced a southern migration, eroding the right or Nebraska bank as it moved and depositing accretion on the left or Iowa side of the river until it reached its 1923 position as shown by Exhibit W-04; there is no satisfactory evidence of an avulsion which occurred between 1890 and 1923.

(4) That after 1923 the river continued to move southerly until 1927. After 1927 the movements of the river were primarily east-west within the western end of the Barrett Survey but in all instances the movements were erosive in nature and not avulsive.

(5) That by 1940 all of the land previously formed within the 1867 Barrett Survey had been eroded away by the action of the river leaving no identifiable land in place and the new land within the Barrett Survey and easterly of the center of the 1940 river in Blackbird Bend was accretion to the Iowa riparian land to which it had attached.

(6) The land owned by Roy Tibbals Wilson, RGP, Inc., Charles Lakin, Harold M. Sorensen and the State of Iowa lying within the Barrett Survey of 1867 and lying east of the 1943 Iowa-Nebraska Compact line is accretion to Iowa riparian land and neither the United States of America nor the Omaha Indian Tribe has any right or claim thereto.

(7) The Omaha Indian Tribe has not been in possession for at least 40 years or more of the land referred to

in the preceding paragraph but rather the defendants or their predecessors in title have been in possession.

(8) As to Travelers Insurance Company, they are a mortgagee only and as such have not been in possession or dictated the use of said land.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and of the subject matter in controversy in these consolidated cases. The claims asserted herein by the plaintiffs, Tribe and the United States of America, arise under a Treaty of the United States and involve sums in excess of $10,000, exclusive of interest and costs. Jurisdiction is, therefore, conferred upon this Court by 28 U.S.C. §§ 1331, 1345 and 1362.

II.

As discussed in the Memorandum Opinion on file herein, state law applies in determining this dispute, and plaintiffs are entitled to rely on Nebraska law to prove their title.

III.

The burden of proof is upon the plaintiffs, Omaha Indian Tribe and United States of America, to prove their title to the land in dispute. The defendants also have the burden of proving the allegations of their counterclaim seeking quiet title relief. As discussed in the Memorandum Opinion on file herein, this Court concludes that neither plaintiffs nor defendants are benefitted by any presumption or other transfer of the burden of persuasion, and that this Court's findings

are supported in this case by a clear and fair preponderance of all of the evidence.

IV.

The plaintiffs failed to sustain their burden of proving that any sudden change of the Missouri River channel occurred in the Blackbird Bend area detaching a block of Omaha Indian Reservation land from the Nebraska bank to the Iowa bank, which land was capable of identification as such, either during the period from 1867 to 1879, 1906 to 1923, as contended by the plaintiffs, or at any other time material herein.

V.

The defendants on the other hand, by their evidence have proven that the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River and occupied by the bed thereof and that at the same time new land was added to the Iowa riparian land, from the owners of which defendants derive their title, by the gradual process of deposition within the Blackbird Bend area and specifically the land within the Barrett Survey to the 1943 Nebraska-Iowa compact line.

At this point two observations about this litigation are in order: First, the *crucial* factual issues in dispute are relatively few; in fact, the testimony of the defendants' experts and the government's expert can to a large extent be reconciled. Secondly, there is at the core of this litigation a sharp dispute as to the legal classification of certain river movements which the evidence reveals. This is a lawsuit in which certain findings of fact, even if agreed upon, would not lead in the minds of all parties concerned to a definite legal conclusion; *i.e.* that either an avulsion or an accretion took place at key times in history at particular places on the Missouri River. It appears in this case that even if findings of fact could be agreed upon, the legal conclusions to be

drawn from them would be vigorously disputed. This Court believes that a discussion of this problem of fitting the evidence into legal categories can make this Court's opinion more comprehensible. The dimensions of what is essentially a legal dispute are easily lost amid the wealth of evidence which was elicited to support very specific findings of fact.

The events which the Court is obligated to reconstruct occurred long ago and they were events of nature; so far as we know these events were not observed in their entirety by any person who could today be a witness concerning them. Indeed, there is some lay testimony that constitutes direct evidence relative to river movements early in this century, but none of this evidence in and of itself is sufficient for the construction of an overview of the river's actions at key times in history in the Blackbird Bend area. Yet an overview, not mere fragments of data, is a necessary predicate for conclusions in this case. Fact-finding must be, therefore, the creation of a synthesis of the fragments of data that pertain to the natural history of the Missouri River in the Blackbird Bend area.

In the process of pulling together the extensive and complicated evidence presented in this case, it becomes apparent that the movements of the Missouri River have not been so clean and precise that they easily fall into the legal categories conveyed by the terms "accretion" and "avulsion". This is *not* to suggest that at this time, after thorough examination of the evidence and the law, this Court holds an ambivalent attitude as to what legal conclusions should be drawn. This Court is convinced that one particular set of conclusions can be squared with the evidence far better than other proposed conclusions. We do suggest, however, that where the law demands precise concepts, nature has supplied the rather erratic behavior of the Missouri River. Holding up the concepts of accretion and avulsion and matching these concepts with our reconstructed view of former river movements is no easy task. The task requires intense analysis and very precise conceptual thinking.

The complexity of the evidence has required this Court to reflect upon the precise meaning of the terms "accretion" and "avulsion" in light of the evidence elicited in this case. In so doing it has become apparent that rendering a decision on the merits means not only that certain proposed findings of the plaintiffs must be rejected but also that certain erroneous legal thinking of plaintiffs must be rejected. Both government counsel and the Tribe's counsel have proceeded throughout this lawsuit with certain presuppositions as to what is required to prove either an accretion or an avulsion. These presuppositions are, in part, at variance with the legal meaning of the terms accretion and evulsion as this Court understands them. These differences in conceptualizing the requirements for a conclusion of accretion or avulsion are slight, but they are crucial and must be noted if the reasons for this Court's conclusions are to be comprehended.

The differences between the government's theory and the requirements of the law can best be illustrated by concentrating on the meaning of the term "evulsion". The government's pretrial statement of its theory of the case studied in conjunction with the testimony elicited by the government from its expert leads us to the following conclusion: the government's theory rests upon the assumption that the foremost and perhaps the single criterion for classifying a river movement as an avulsion is a sudden movement of the thalweg; thus under the government's theory an avulsion can be defined with no reference whatever to river banks or other land forms. That assumption, we believe, cannot withstand critical scrutiny.

Assume that a stream evolves to have a braided character, *i.e.* it has several channels of various depths, the deepest of which contains the thalweg. According to the government's theory of avulsion, if the deepest channel begins to fill in with silt, then a point in time will come when another channel is deeper; hence, a new thalweg will suddenly appear. This sudden movement of the thalweg or emergence of a new thalweg, it is asserted, has the character of a "jump" and indicates that an avulsion has taken place.

The government's theory would compel us to recognize "jumps" (*Ergo* avulsions) under many other circumstances. If the thalweg were hard against one bank of a river prior to an inundation and subsequent to the inundation appeared suddenly at another place in the river, the government's theory would no doubt necessitate the conclusion that an avulsion had occurred in view of the obvious fact that the thalweg had moved suddenly, in a few hours or a few days, to a new location.

That idea of an avulsion is innovative and thought-provoking but it cannot be reconciled with the common law legal concepts which we discussed earlier in this opinion. The government's criterion for recognizing an avulsion, a sudden movement of the thalweg, is inadequate to provide the conceptual framework for the resolution of this dispute if the Court adheres, as it must, to the common law concepts of accretion and avulsion.

The reasons are obvious. The government would have us recognize avulsions in a variety of river movements that leave no commonly accepted indicia of an avulsion, particularly land in place and an abandoned channel. Moreover, if the indicia of avulsion are cast aside, then the distinction between accretion and avulsion will become virtually meaningless.

The experts uniformly state that lateral river movements do not occur at a constant rate, for example, X feet per hour or per day. Due to the tremendous number of variables involved, movements of the thalweg may be sudden, seemingly erractic, and in some cases not immediately perceptible to a lay observer. Carrying the government's theory to its logical conclusion, many river movements historically known as accretions would be thrown over into the category of avulsions insofar as they result from river movements that are sudden and where the movement of the thalweg could rightly be characterized as a "jump".

In short, even if the question of government counsel (whether the river was jumping around at the times and places in question) were answered in the affirmative, the

conclusion of an avulsion would not necessarily follow. We will not go so far as to assert that an avulsion can only occur when there is a chute cut-off or a neck cut-off, but it is necessary that identifiable land in place and evidence of an abandoned channel be visible subsequent to a river change before it can be classified as an avulsion.

The government has, no doubt, derived this theory of an avulsion from a more "scientific" analysis of the river movements than that which underlies the common law. From our vantage point at this time, it seems that if plaintiffs were to prevail in this suit, it could only have been by convincing this Court that this more "scientific" view of river movements, which would require constant attention to only the position of the thalweg, would be somehow harmonious with the common law. The evidence is simply insufficient to support findings that the traditional indicia of an avulsion existed at the key points in time.

The differences between this Court's analysis of the law and the views of the Tribe's counsel can best be illustrated by focusing upon the meaning of the term "accretion". It seems to this Court that the vigorous cross-examination of the defendants' experts by the Tribe's counsel revealed an operating assumption that involves the concept of accretion; namely: Tribe's counsel assumes that a conclusion of accretion can never be made without a finding of continuity and contiguity between allegedly accreted lands and lands to which accretions allegedly attached. We find no error in this assumption itself, but do state that the terms "continuity" and "contiguity" themselves need to be analyzed. In this area the need for conceptual clarity is greater than ever.

Under the common law, as it is used in Iowa and Nebraska, a conclusion that accretion has occurred can only be made when land attaches to a shoreline; indeed, it is the growth of the shoreline that constitutes accretion. The accreted lands must, according to a commonly accepted doctrine, be above the ordinary high water mark. Therefore, continuity and contiguity are required and up to this point the reasoning of Tribe's counsel parallels that of this Court.

However, it appears that the view of Tribe's counsel is slightly but crucially at variance with this Court's understanding of what is required to prove an accretion. In this Court's view the twin concepts of continuity and contiguity do *not* require either the absence of any and all surface water on all accretion lands at all times subsequent to attachment nor do they require a level, uniform extension of the shoreline by homogeneous soil-building materials.

First, we will consider the significance, if any, of water on lands alleged to be accretions. It is clear to this Court that the process of accretion can and often does occur in such a manner that puddles, sloughs and stagnant back-water of various common and technical descriptions are present for many years on low-lying portions of accreted lands and often at the juncture of accreted lands and lands to which they attach. The water may be the result of rainfall, a high water table or periodic inundation. Whatever its origin, the presence of water part of the time or even permanently at some sites does not in and of itself defeat the conclusion that an accretion has occurred. There can be contiguity and continuity of the land despite the presence of some water. As long as the mass of land which is purportedly an accretion is attached to the former shoreline in such a manner that it appears to our common senses to be a growth of that old shoreline, then the land is accretion land.

It is this Court's view that the lands within the Barrett Survey area are now and for some time have been both continuous with and contiguous to the former Iowa shoreline. This means that they are accretion lands despite the presence of water which now and in earlier times interrupted to some degree the otherwise uninterrupted extension of the land.

We must also consider the question of whether the heterogeneous character of the soils throughout the Barrett Survey together with the vestiges of former river channels in that area defeat the conclusion that the area was formed by accretion. The answer is an unequivocal negative.

The soil throughout the area is *not* of a homogeneous composition. By the use of early aerial photography vestiges

of former channels *can* be traced. This means that the Missouri River, to no one's great surprise, did not move at a uniform rate of speed at all times and did not pile up soils of a uniform character in the process. Yet, these facts do not negate the conclusion that the Barrett Survey area as it exists today is the result of a process of accretion; even less do they tend to prove an avulsion. This evidence is entirely consistent with the theory advanced by defendants. The key again is the growth of the shoreline. How that growth occurred, whether steadily or by jumps, whether uniformly or unevenly, is of no concern.

VI.

Judgment will be entered in favor of the defendants, RGP, Inc., Roy Tibbals Wilson, Charles E. Lakin, State of Iowa, Harold M. Sorenson, and Travelers Insurance Company quieting title in them to the Barrett Survey land in controversy in these cases claimed by them respectively as against the plaintiff, Omaha Indian Tribe.

VII.

The preliminary injunction herein granted on June 5, as extended and supplemented, will be set aside.

VIII.

There is no basis for an injunction against Travelers Insurance Company as prayed in 4024 either to put the Indians in possession or to enjoin against interfering with possession and use by plaintiffs or as prayed in 4067 to enjoin from interfering with plaintiff's possession or denying access to or preventing harvest by plaintiffs.

IX.

Travelers Insurance Company has a valid and enforceable first mortgage lien against the land owned by RGP, Inc. which is superior to any rights of the plaintiffs.

The foregoing shall constitute this Court's findings of fact and conclusions of law, and this Court's Memorandum Opinion on file herein shall be deemed to be the basis for its conclusions of law.

Dated this 2d day of May, 1977.

By the Court:

/s/ ANDREW W. BOGUE
United States District Judge

Attest:

William J. Srstka, Clerk

By.....Deputy

DECREE

(Filed May 4, 1977)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

* * * *

2. The clear and convincing evidence is that the original "Barrett Survey" lands and accretions thereto have been entirely eroded and washed away by the erosive force of the river since 1867. The land in this litigation was not left by avulsive action of the river, but was formed by accretion to the riparian land on the Iowa side of the river, commencing sometime after 1867 and defendants' title is derived therefrom.

3. Plaintiffs' prayers for relief are hereby denied, and judgment is hereby given to the defendants on their counterclaims, and as between the defendants on the one hand and the plaintiffs on the other hand, title to the Barrett Survey land is quieted in defendants as their respective interests may appear.

* * * *

7. Causes numbered C-75-4024 and C-75-4026 and that portion of C-75-4067 involved in this trial are dismissed, without costs to either party.

Dated this 2nd day of May, 1977.

By the Court:

/s/ Andrew W. Bogue
United States District Judge

Attest:

APPENDIX L

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4026

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended,

Plaintiff,

vs.

HAROLD JACKSON and OTIS PETERSON, and the DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Defendants.

COMPLAINT FOR INJUNCTION, FOR A STAY OF STATE COURT PROCEEDINGS AND OTHER RELIEF

(Filed May 20, 1975)

COMES NOW the Omaha Indian Tribe, organized under a constitution and by-laws ratified by the Tribe on February 15, 1936, and approved by the Secretary of the

[copy missing]

7. That the United States of America has filed a quiet title action in this Court, No. C-75-4024, asking for injunctive relief and the quieting of title; it is the strong belief of the

Omaha Tribe of Nebraska, as set out in the Resolutions and Affidavit attached hereto, Ex. D, that said action is untimely and is in effect a conduit to permit and allow the defendants to retake prossession of the lands involved during the extended period involved in a quiet title action; said quiet title action was filed over the protests of the Omaha Tribe of Nebraska and should not be entertained in any other light by this Court. The Tribe is now in possession and should be permitted to retain and possession, as the lands are clearly theirs.

8. That this plaintiff will be irreparably damaged if the Stay is not issued and if the injunction is not permitted by this Court.

WHEREFORE, the plaintiff prays for:

1. A stay of the injunction and the supplemental injunction issued in the District Court of Iowa in and for Monona County under Title 28, Section 2283, United States Code, restraining the Court, Monona County officials and the defendants herein or any other parties from enforcing or attempting to enforce said injunction.

2. For a preliminary injunction maintaining the Omaha Tribe in possession of the lands involved herein until the rights of the parties can be determined by this Court.

3. For a permanent injunction maintaining the Omaha Tribe of Nebraska in possession of thier rightful land.

4. For relief of this plaintiff of any ex parte rulings or orders that it does not support in cause No. C-75-4024 now pending in this Court.

5. An order of this Court setting a hearing and providing for notice to the defendants of said hearing.

6. For such other relief as the Court may find justified.

O'BRIEN & O'BRIEN

By /s/ John T. O'Brien

916 Grandview Boulevard
Sioux City, Iowa 51101
Ph. (712) 255-0147

Attorneys for Plaintiff

APPENDIX M

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, *et al.*,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, *etc.*,

Plaintiff,

vs.

HAROLD JACKSON, *et al.*,

Defendants.

ORDER

(Filed June 5, 1975)

This matter is before the court on resisted cross-applications for preliminary injunctions, filed in No. C 75-4024 on May 19, 1975 by plaintiff and on May 22, 1975 by defendants, and filed in No. C 75-4026 on May 20, 1975 by plaintiff

and on May 28, 1975 by defendants. The applications for preliminary injunctions have been submitted for decision by the court upon the briefs and the record filed herein.

The controversy here involves the ownership of and possessory rights to an area of land comprising approximately 3000 acres bordering on the Missouri River in Western Iowa. During the mid-nineteenth century, the lands in question were located on the Nebraska side of the Missouri River, circumscribed by an oxbow of the River known as Blackbird Bend.

As indicated by the Barrett survey of 1867, the Blackbird Bend Area of Nebraska was encompassed within the boundaries of the Omaha Indian Reservation, established pursuant to the treaty of March 16, 1854, 10 Stat. 1043,[1] with title in the United States as trustee for the Omaha Indian Tribe. The dispute arises as to the subsequent geophysical history of the contested lands.

The plaintiff in each case contends that the Blackbird Bend Area became located on the eastern bank[2] through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's. An avulsive change in the River's course would not alter the status of title to the riparian lands. *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638 (1917); *Nebraska v. Iowa*, 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798 (1891).

Defendants contend that the disputed lands have formed through accretion to the previuos eastern shore of the River. Accretions to riparian land are added to the title ownership of the landowner. *Arkansas v. Tennessee, supra.* Defendants are successors in interest to the allegedly accreted lands in this case.

---

[1] The Omaha Tribe, exercising a prerogative under the treaty, selected the actual situs of the reservation in lieu of the description found in the treaty. *See Omaha Tribe v. United States*, 4 Ind. Cl. Comm. 627 (1957).

[2] This area became a part of Iowa when the States of Iowa and Nebraska agreed to fix their boundary line through the Boundary Compact of 1943. *See Nebraska v. Iowa*, 406 U. S. 117, 120 n. 4, 92 S. Ct. 1379, 31 L. Ed.2d 733 (1972).

The disputed area has been cleared and farmed since some time in the 1940's. Defendants Harold Jackson and Otis Peterson have leased the contested premises for the current crop year from Roy T. Wilson and Raymond G. Peterson, respectively. During April of this year, members of the Omaha Tribe, acting under authority of the Tribal Council, have entered upon the lands and posted signs declaring the area to be part of the Omaha Reservation. Bureau of Indian Affairs (BIA) officials assisted them in delimiting the boundaries.

Harold Jackson and Otis Peterson instituted an equity action on April 23 in Iowa District Court for Monona County[3] seeking to enjoin members of the Tribe from entering upon the contested real estate. On May 16,[4] following an amendment to the petition, the Iowa District Court issued a temporary writ of injunction restraining all members of the Tribe from entering upon said lands or interfering with the farming thereof by the plaintiffs in that case.

The United States in No. C 75-4024 seeks to quiet title to all lands in the Blackbird Bend area which allegedly remain a part of the Omaha Indian Reservation. The United States also prays for preliminary and permanent injunctions restraining defendants from prosecuting Equity No. 18965 in the State court, from attempting to enforce the aforementioned orders of the State court, and from interfering with the possession, use, or occupancy of the lands in question by the Tribe.

In No. C 75-4026, the Omaha Tribe eschews a quiet title action, asserting that the institution of such an action by the United States is an ineffectual way for the Government to protect its ownership rights as trustee in the contested lands. Preliminary and permanent injunctions similar to those in No. C 75-4042 are sought by the Tribe, and the applications for preliminary injunction in both cases are therefore being considered simultaneously in this ruling. Defendants in each

[3] Equity No. 18965, District Court of the State of Iowa in and for Monona County.

[4] On May 15, the court issued an order enjoining only certain named members of the Tribe from entering upon the disputed area.

action seek a preliminary injunction enjoining all persons other than the defendants from interfering with possession of the contested lands by the defendants.

The granting of a preliminary injunction rests within the second discretion of the court, with the burden on the applicant to show a substantial probability of success on the merits and irreparable injury absent issuance of an injunction. The two other factors to be considered are the likelihood of harm resulting to other parties to the proceedings, and the nature of any public interest to be served by granting the injunction. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323,1326 (8th Cir. 1973); *Allison v. Froehlke*, 470 F.2d 1123, 1126 (5th Cir. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602, 603-604 (D. Minn. 1972).

Considering these factors as applied to this case, it is the court's view that plaintiffs are entitled to some form of a preliminary injunction.

It is undisputed that the Blackbird Bend area was previously within the Reservation boundary. The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time.

The irreparable injury to be incurred here is the total loss of a growing season if one party or the other is not promptly prohibited from interfering with the other's attempts to farm the land. At present the apprehensiveness on both sides has prevented all but 160 acres of corn from being planted in the area.

The probability of financial injury to the defendants, tenants and purported landowners of the area in question, is substantial, but will be reduced by the court's form of injunction as set out below, which will require the net profits from this year's farming operation to be deposited with the Clerk of Court pending final determination of the quiet title action.

Finally, the public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty. Congress has expressed its desire to protect the interests of Indians in real property by prohibiting conveyance of such lands without the consent of the government, 25 USC §177; *United States v. 7,405.3 Acres of Land,* 97 F.2d 417 (4th Cir. 1938). A preliminary injunction is an appropriate provisional remedy when special federally protected rights of Indians are threatened. *Organized Village of Kake v. Egan,* 80 S. Ct. 33, 4 L. Ed.2d 34, 1959) (Brennan, J., acting in capacity of circuit justice).

Defendants argue that a preliminary injunction is intended to maintain the status quo, 7 *Moore's Federal Practice* §65.04[1], and the status quo is defined as the last uncontested status which preceded the pending controversy. *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F. 2d 804, 808, 809 (9th. Cir. 1963); *westinghouse electric corp. v. Free Sewing Machine Co.,*256 F. 2d 806, 808 (7th. Cir. 1958). It is asserted by defendants that their possession in previous years was the last peaceable and uncontested occupancy, and that granting plaintiffs a preliminary injunction essentially awards them relief to which they would only be entitled upon a favorable determination on the merits.

The court cannont agree. The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course. But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC §476, and with the assistance of the BIA acting in its capacity as an executive agency, constitutes the status quo to be preserved. Designees of the Tribal Council have planted 160 acres and tilled another 500 acres, the only farm work done this spring in the area.

Since the United States is here seeking an injunction to prevent threatened irreparable injury to a federally protected interest, to wit, possession of and title to lands originally owned by the United States in trust for the Omaha Indians, the prohibition against enjoining state court proceedings in 28 USC §2283 is not applicable here. *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267 (1957); *United States v. Akin,* 504 F. 2d 115 (10th Cir. 1974) (United States suing as trustee of water rights held on behalf of Indian tribes).

The State of Iowa entered a special appearance in this matter to contest jurisdiction because of improper service. Though subsequently served, the State argues that the delayed notice has prevented it from preparing detailed exhibits and arguments. The State asks that the land to which it claims an interest, and which is not under cultivation, be exempted from any injunctive decree. No accurate legal description of this property having been submitted, the court is unable to specifically position or exempt this parcel, but will entertain a motion for relief from the decree should the State deem it necessary.

It is therefore

ORDERED

1. Defendants' applications for preliminary injunction denied.

2. Plaintiffs' applications for preliminary injunction granted.

3. Each and every defendant, his agents, employees, and successors in interest, is hereby enjoined and restrained from interfering with the use and occupancy of the lands hereinafter described by the Omaha Tribe and its individual members, agents, employees or designees, and from prosecuting or attempting to prosecute that action heretofore filed in the District Court of Iowa in and for Monona County, entitled *Jackson, et al. v. Cline, et al.,* Equity No. 18965, and from attempting to enforce any orders in said state court action directing any individual member of the tribe to vacate any

portion of the lands hereinafter described, or any such orders permitting any of the defendants herein to occupy any portion of said lands, until such time as this case may be heard and final judgment entered. This order shall apply to all lands described as follows, and which are east of the 1943 Iowa Nebraska compact line and which have not been allotted to individual members of the Omaha Tribe and thereafter sold to nonmembers;

(Land description omitted in printing.)

4. Plantiff Omaha Indian Tribe shall deposit with the Clerk of Court the net profits received for all crops harvested from the aforesaid lands during the calendar year 1975, together with a report of receipts and disbursements.

June 5, 1975.

/s/ Edward J. McManus

Chief Judge, United States
District Court

APPENDIX N

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN, FLORENCE LAKIN, R.G.P., INCORPORATED, an Iowa Corporation, HAROLD JACKSON, OTIS PETERSON, TRAVELERS INSURANCE COMPANY and the STATE OF IOWA,

Defendants,

(Filed May 19, 1975)

COMPLAINT TO QUIET TITLE AND FOR INJUNCTIVE RELIEF

CLAIM I

1. The United States is plaintiff in this action and this court has jurisdiction under 28 U.S.C. 1345.

2. The United States owns land in Monona County, Iowa, which is described as follows:

All descriptions are from the T.H. Barrett Survey.

Township 24 north, Range 10 east, 6th P.M. (Plat approved October 2, 1867).

Section 10, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 11, lots 3, 4, 5, 6 and 7, NW¼ SW¼, S½ SW¼, and all that portion of lots 1 and 2 east of the 1943 Iowa-Nebraska compact line, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 13, lots 1, 2, 3 and 4, S½ N½, S½.

Section 14, lot 1, NW¼ NE¼, S½ NE¼, NW¼, S½, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 15, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 22, all that portion east of the east or left bank of the present Missouri River.

Section 23, lots 1 and 2, N½ NE¼ and NE¼ NW¼, and all that portion of lot 3 and the W½ NW¼ east of the east or left bank of the present Missouri River.

Section 24, lots 1, 2, 3 and 4.

Township 24 north, Range 11 east 6th P.M. (Plat approved October 2, 1868).

Section 17, lots 1, 2, 3 and 4.

Section 18, lots 1, 2, 3 and 4, S½ N½, S½.

Section 19, lots 1, 2, 3 and 4.

Section 20, all of the fractional section.

The lands described are believed to contain approximately 2900 acres.

In addition to the above-described lands, the plaintiff claims for the use and benefit of the Omaha Tribe of Indians all lands in the bed of the Missouri River as it existed when

the Omaha Indian Reservation was created extending from the lands described to the center of the main channel of the River.

3. The lands described in paragraph 2 are a part of the Omaha Indian Reservation to which the United States holds title for the use and benefit of the Omaha Tribe of Indians.

4. The Omaha Tribe of Indians and members of that Tribe are now in possession of the lands described in paragraph 2.

5. The defendants, or some of them, are claiming some right to title or interest in and to the lands described in paragraph 2 and are asserting the right to possession of those lands. The claims of defendants are null and void and of no effect.

6. The plaintiff is entitled to a judgment quieting its title to the lands described in paragraph 2 to be held for the use and benefit of the Omaha Tribe of Indians, upholding the right of possession of the Omaha Tribe and its members to those lands, and declaring that the defendants have no right to title or interest in and to such lands and no right to the possession thereof.

7. The plaintiff and the Omaha Tribe of Indians will suffer irreparable injury unless judgment is entered by this court upholding their title and right to possession of the lands described in paragraph 2.

WHEREFORE, the plaintiff prays that judgment be entered as follows:

(a) For a preliminary injunction maintaining the Omaha Tribe and its members in possession of the lands described in paragraph 2 hereof until the rights of the parties of this action can be determined by this court.

(b) For a judgment quieting the title of the United States to the lands described in paragraph 2 for the use and benefit of the Omaha Tribe of Indians; declaring that defendants have no right to title in or to such lands, or any of them; and enjoining the defendants from

asserting any title to such lands or interfering in any way with the possession, use and occupancy of such lands by the United States, the Omaha Tribe and its members.

(c) For such other relief as the court may find justified and for the costs of this action.

CLAIM II

8. Plaintiff adopts and incorporates paragraphs 1 through 7 above.

9. Defendants Harold Jackson and Otis Peterson heretofore on or about April 23, 1975, filed a petition in the District Court of Iowa in and for Monona County which appears in the records of that court as Equity No. 18965, a copy of which is attached to this complaint. Named as defendants therein are six Indians in their individual capacity and as representatives of all members of the Omaha Tribe of Nebraska, their agents, employees or representatives.

10. The plaintiffs in Effuity No. 18965 claim to be tenants in actual occupancy of a portion of the lands described in paragraph 2 of this complaint and seek Temporary and Permanent Writs of Injunction prohibiting members of the Omaha Tribe from occupying said lands or interfering with Jackson's and Peterson's farming of the land claimed by them. The purpose and effect of the petition in Equity No. 18965 is to challenge the title and possession of the United States and of the Omaha Tribe of Nebraska to those lands claimed by Jackson and Peterson. The United States is an indispensable party to Equity No. 18965. It is not a party to Equity No. 18965 and cannot be made a party to that action. By filing this action, the United States has brought before this court all interested parties so that all conflicting claims may be litigated in one action. Any judgment entered in this action will be binding upon the Omaha Tribe of Nebraska and its officers since they are represented by the United States.

11. The United States is entitled to have title to the property claimed by it on its own behalf and on behalf of the

Omaha Tribe of Nebraska quieted against any claims by defendants Jackson and Peterson.

12. Equity No. 18965 is an attempt by defendants Jackson and Peterson to wrest possession from the United States and its wards in an action to which the United States is not and cannot be made a party, to the permanent and irreparable injury of the United States and its Indian wards. The mere pendancy of the state court action constitutes a threat against and an interference with the substantial rights of the United States and its wards, and threatens the jurisdiction of this court to hear and determine actions brought by the United States to quiet title to land.

WHEREFORE plaintiff prays:

(a) That this court enter an order permanently enjoining defendants Jackson and Peterson, their agents, employees, or assigns and all persons in active concert or participation with them from prosecuting or attempting to prosecute the action entitled Jackson, et al. v. Cline, et al., Equity No. 18965, In the District Court of Iowa in and for Monona County, insofar as that action relates to any lands described in paragraph 2 of this complaint;

(b) For an order permanently enjoining defendants Jackson and Peterson and their agents, employees, or assigns and all persons in active concert or participation with them from enforcing or attempting to enforce an order entered in Equity No. 18965 on or about May 15, 1975, which plaintiff is informed and believes prohibits certain members of the Omaha Tribe from maintaining possession of a portion of the lands described in paragraph 2 of the complaint and/or prohibiting them from interfering with farming activities by defendants Jackson and Peterson;

(c) For preliminary injunction restraining defendants Jackson and Peterson and their agents, employees or assigns and all persons in active concert or participation with them from prosecuting or attempting to prose-

cute Equity No. 18965 or enforcing or attempting to enforce the order entered therein on or about May 15, 1975, until the rights of the parties in this action can be determined by this court;

(d) For such other and additional relief as may be just and proper.

EVAN L. HULTMAN
United States Attorney

By /s/ Robert L. Sikma
Assistant United States Attorney
Northern District of Iowa

APPENDIX O

(Signatures and proof of service omitted in printing.)

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C-75-4067

OMAHA INDIAN TRIBE, Treaty of 1854 with the United States (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) as amended,

Plaintiff,

vs.

DEFENDANTS:

TRACT I—BLACKBIRD BEND AREA

Agricultural & Industrial Investment Company;

* * * *

Lakin, Charles E.; Lakin, Florence

* * * *

Peterson, Otis

* * * *

R.G.P. Incorporated, an Iowa Corporation

* * * *

State of Iowa, State of Iowa Conservation Commission

* * * *

Wilson, Roy Tibbals

COMPLAINT

To quiet title for immediate access permanent injunction order for quiet possession for damages.

(Filed October 6, 1975)

Comes now the OMAHA INDIAN TRIBE, acting pursuant to its Treaty with the UNITED STATES OF AMERICA (10 Stat. 1043 et seq.), made and concluded in the City of Washington on the sixteenth day of March, one thousand eight hundred and fifty-four, the Constitution and laws of the United States, the Omaha Indian Tribe being a body corporate established pursuant to its Constitution and By-Laws formulated and adopted by the Omaha Indian Tribe, and approved by the Secretary of the Interior, principal agent of the United States, Trustee for the Omaha Indian Tribe, the Omaha Indian tribe and its governing body, having been duly recognized by the Secretary of the Interior, all in accordance with Section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476), and complains, alleges and avers that:

CLAIM NO. I

To quiet title in the Omaha Indian Tribe to 11,300 acres, more or less, of land in the Omaha Indian Reservation within the State of Iowa.

1. This Court has jurisdiction of this civil action brought by the Omaha Indian Tribe on its own behalf, pursuant to Section 1331 of Title 28 of the United States Codes, which confers jurisdiction upon this Court involving actions that arise "* * * under the Constitution, laws, or treaties" of the United States, "wherein the matter in controversy exceeds the sum or value of $10,000" and pursuant to Section 1362 of Title 28 of the United States Codes which provides this Court "* * * shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises, under the Constitution, laws, or treaties of the United States."

2. From time immemorial the Omaha Indian Tribe, plaintiff herein, occupied a vast area of land totaling 5,283,265 acres which was intersected by the Missouri River and located in part in the present States of Iowa and Nebraska. The Omahas, from time immemorial, had and still have their own communities, institutions, laws, and customs, exercising inherent powers of self-government. For over a century and a half the Omaha Indian Tribe has entered into Treaties with the United States. The final Treaty, in so far as here pertinent, between those two sovereigns was signed in the City of Washington, on March 16, 1854 (10 Stat. 1043), the "Treaty with the Omaha, 1854" hereafter referred to as the Treaty of 1854.

3. By the Treaty of 1854, the Omaha Indian Tribe Reserved to itself—did not grant to the United States—the present Omaha Indian Reservation. That land thus reserved by the Omahas pursuant to their Treaty of 1854, was all situated in the soon thereafter created Territory of Nebraska. Several years subsequent to the Treaty of 1854 the State of Nebraska was admitted into the Union.

4. The middle of the main channel of the Missouri River was the common boundary established between the Omaha Indian Reservation and the State of Iowa, all as prescribed by the Treaty of 1854, the Act of Congress for the admission of Iowa into the Union and the Constitution of the State of Iowa. Similarly, the middle of the main channel of the Missouri River was declared to be the common boundary between the States of Iowa and Nebraska.

5. The State of Iowa (1 Iowa Code Anno. 85 et seq.) and the State of Nebraska (2A Revised Statutes of Nebraska, 728 et seq.) ratified the Iowa-Nebraska Compromise Boundary Compact, which was approved by the Congress and became effective by the Act of July 12, 1943, Ch. 220 (57 Stat. 494). By that Compromise Boundary Compact the middle of the main channel of the Missouri River was no longer the common boundary between the State of Iowa, the Omaha Indian Reservation and the State of Nebraska. That Compromise Boundary between the State of Iowa and the

State of Nebraska, did not and could not affect the title to the lands of the Omaha Indian Tribe constituting its Reservation, which title to the lands involved is the subject matter of this Complaint.

6. The Omaha Indian Tribe, pursuant to its Treaty of 1854, the Constitution and laws of the United States, holds title to and is entitled to have full, peaceful and quiet possession of 11,300 acres, more or less, of land, being that part of the Omaha Indian Reservation, situated in Monona County, State of Iowa.

7. Those 11,300 acres of land, more or less, title to which is in the Omaha Indian Tribe and being that part of the Omaha Indian Reservation within the State of Iowa referred to in the paragraph of this Complaint which immediately precedes, are divided for the purposes of this litigation, into three separate tracts or parcels of land referred to throughout this Complaint as:

a. Tract I, The Blackbird Bend Area,
comprised of 6,390 acres, more or less;

b. Tract II, The Monona Bend Area,
comprised of 4,185 acres, more or less;

c. Tract III, The Omaha Mission Bend Area,
comprised of 725 acres, more or less;
Totalling 11,300 acres, more or less.

8. Attached to this Complaint is a map, marked Exhibit A, entitled "Omaha Indian Reservation Boundary Determination", hereafter referred to as Exhibit A and by reference made a part of this Complaint, setting forth the Iowa-Nebraska Compromise Compact Boundary from the northern boundary of the Omaha Indian Reservation in the State of Iowa to the southern boundary of that Reservation in the State of Iowa.

9. There is likewise set forth on Exhibit A of this Complaint the eastern boundary of the Omaha Indian Reservation within the State of Iowa. Also set forth on Exhibit A of this Complaint are the eastern boundaries of the above

referred to: Tract I, The Blackbird Bend Area; Tract II, The Monona Bend Area; and Tract III, The Omaha Mission Bend Area of the Omaha Indian Reservation within the State of Iowa, all as set forth in paragraph 6 of this Complaint.

10. Attached to this Complaint, marked Exhibit B, entitled "Legal Description of the Omaha Indian Reservation Within the State of Iowa," hereafter referred to as Exhibit B of this Complaint, is a precise and accurate legal description of the Omaha Indian Reservation Within the State of Iowa. Those lands, the title to which resides in the Omaha Indian Tribe, all as averred above, are sometimes referred to in this Complaint as the Omaha Indian Reservation within the State of Iowa.

11. In clear violation of the Treaty of 1854, the Constitution and laws of the United States, and of the rights, title and interests of the Omaha Indian Tribe in and to the lands depicted on Exhibit A and as fully and accurately described in Exhibit B of this Complaint, all as averred above, the above named defendants and each of them, claim some right, title, interest or estate adverse to those rights, title, and interests of the Omaha Indian Tribe, in and to the lands of the Omaha Indian Reservation within the State of Iowa. Those adverse claims of the defendants and each of them, in and to the rights, title and interests of the Omaha Indian Tribe in and to the lands of the Omaha Indian Reservation within the State of Iowa, arise from illegal and willful trepasses upon and occupancy of those lands of the Omaha Indian Tribe and are invalid, illegal and, being totally without merit, are null and void and of no force and effect.

12. The Omaha Indian Tribe denies that the defendants or any of them have any valid right, title, interest or estate in or to any of the lands comprising the Omaha Indian Reservation within the State of Iowa, all of which are depicted on Exhibit A and described in Exhibit B of this Complaint, but rather the Omaha Indian Tribe affirmatively alleges those adverse claims of the defendants and each of them are illegal, invalid and totally without merit, all as averred above.

13. The Omaha Indian Tribe, by reason of the willful and illegal trespasses upon and occupancy of, and the illegal and invalid claimed rights, title, interests and estates in and to the lands comprising the Omaha Indian Reservation within the State of Iowa by the above named defendants and each of them, is now and has been for many years past, suffering irreparable damages and the Omaha Indian Tribe will, unless and until the relief and all of it prayed for in this Complaint is awarded to it, continue to suffer those irreparable damages.

14. The Omaha Indian Tribe is entitled to judgment by this Court entered against the defendants and each of them, adjudging, determining, declaring and quieting its title in and to the lands of the Omaha Indian Reservation within the State of Iowa, and denying each and every adverse claim of the defendants, and the Omaha Indian Tribe is entitled to a judgment and decree restoring it to full, peaceful and quiet possession of the full 11,300 acres, more or less, of the lands comprising that part of the Omaha Indian Reservation within the State of Iowa.

CLAIM NO. II

For Permanent Injunction, omitted in printing

CLAIM NO. III

For Immediate Possession and Payment of Damages, omitted in printing.

WHEREFORE, the Omaha Indian Tribe, Plaintiff herein, prays this Court for entry of a judgment in its favor:

* * *

4. Determining, declaring, adjudging and quieting the title of the Omaha Indian Tribe, Plaintiff herein, to the lands of the Omaha Indian Reservation within the State of Iowa, which lands are described with particularity in Exhibit B and clearly depicted and designated on

Exhibit A of this Complaint; determining, declaring and adjudging that Defendants have no right, title, interest or estate in or to the lands of the Omaha Indian Reservation within the State of Iowa, title to which resides in the Omaha Indian Tribe; forever restraining and enjoining the Defendants and each of them from claiming or asserting any right, title, interest or estate in and to the lands of the Omaha Indian Reservation within the State of Iowa referred to above; said Plaintiff prays for the establishment of the Plaintiffs estate and that the Defendants and each of them be barred and forever estopped from having or claiming any right or title to these premises adverse to the Plaintiff; forever restraining and enjoining the Defendants and each of them from interfering in any way with the free and ready access, full use and occupancy by the Omaha Indian Tribe, its individual members of that Tribe, agents, employees, lessees and designees and the United States of America, Trustee for the Omaha Indian Tribe and its authorized agents, employees, and contractors.

* * *

(Paragraphs 1 through 3 and 5 through 8 omitted in printing).

OMAHA TRIBE OF NEBRASKA

By: /s/ Edward L. Cline

Dated: October 6, 1975.

ATTORNEYS FOR TRIBE
O'BRIEN & O'BRIEN

By: /s/ John T. O'Brien
916 Grandview Blvd.
Sioux City, Iowa 51101

(Verification omitted in printing).

(Exhibits B (land description), C–1 (Barrett Survey retracement description) and D (6/5/75 order, printed following complaint in C75–4026) omitted in printing).

APPENDIX P

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON [JOHN R. WILSON]; CHARLES E. LAKIN; FLORENCE LAKIN; R.G.P., INCORPORATED, an Iowa Corporation; HAROLD JACKSON; OTIS PETERSON; TRAVELERS INSURANCE COMPANY and the STATE OF IOWA, *et al.*,
Defendants.

No. C-75-4024

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

JACKSON, HAROLD; PETERSON, OTIS; DISTRICT COURT IN AND FOR MONONA COUNTY, IOWA; ROY TIBBALS WILSON [JOHN R. WILSON] and CHARLES LAKIN,
Defendants.

No. C-75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

DEFENDANTS: TRACT I—BLACKBIRD BEND AREA—
JACKSON, HAROLD; LAKIN, CHARLES E. and FLORENCE; PETERSON, OTIS; R.G.P., INC.; SORENSON, DARRELL, HAROLD, and LUEA; STATE OF IOWA; TRAVELERS INSURANCE COMPANY and WILSON, ROY TIBBALS [John R. Wilson], *et al.*

No. C-75-4067

MOTION OF OMAHA INDIAN TRIBE FOR SUMMARY JUDGEMENT AGAINST EVAL L. HULTMAN, UNITED STATES ATTORNEY, MYLES E. FLINT, DEPUTY ASSISTANT ATTORNEY GENERAL, AND JAMES J. CLEAR, ATTORNEY, DEPARTMENT OF JUSTICE, WITH AFFIDAVITS AND MEMORANDUM IN SUPPORT

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
[202] 466-3890

Attorney for
Omaha Indian Tribe

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON [JOHN R. WILSON]; CHARLES E. LAKIN; FLORENCE LAKIN; R.G.P., INCORPORATED, an Iowa Corporation; HAROLD JACKSON; OTIS PETERSON; TRAVELERS INSURANCE COMPANY and the STATE OF IOWA, *et, al.*,
Defendants.

75-4024

OMAHA INDIAN TRIBE,
Plaintiff,

vs.

JACKSON, HAROLD; PETERSON, OTIS; DISTRICT COURT IN AND FOR MONONA COUNTY, IOWA; ROY TIBBALS WILSON [JOHN R. WILSON] and CHARLES LAKIN,
Defendants.

75-4026

OMAHA INDIAN TRIBE,
Plaintiff,

vs.

DEFENDANTS: TRACT I—BLACKBIRD BEND AREA—
JACKSON, HAROLD; LAKIN, CHARLES E. and FLORENCE; PETERSON, OTIS; R.G.P., INC.; SORENSON, DARRELL, HAROLD, and LUEA; STATE OF IOWA; TRAVELERS INSURANCE COMPANY and WILSON, ROY TIBBALS [John R. Wilson], *et, al.*,

75-4067

MOTION OF OMAHA INDIAN TRIBE FOR SUMMARY JUDGMENT AGAINST EVAN L. HULTMAN, UNITED STATES ATTORNEY, MYLES E. FLINT, DEPUTY ASSISTANT ATTORNEY GENERAL, AND JAMES J. CLEAR, ATTORNEY, DEPARTMENT OF JUSTICE, WITH AFFIDAVITS AND MEMORANDUM IN SUPPORT

The Omaha Indian Tribe, Plaintiff in the above entitled cases Nos. C 75-4026 and C 75-4067, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rules 2.2.1 and .7 of the Rules of the United States District Court for the Northern and Southern Districts of Iowa,

MOVES THIS COURT FOR SUMMARY JUDGEMENT, and in support of this Motion, incorporates by reference the attached Verified Statement, together with Map of Blackbird Bend Area, Appendix A; Affidavit of Elmer M. Clark, Appendix B; and relevant documents, Appendices C and D, which are made a part of this Motion to the same extent and with the same affect as if set forth herein in full, and

RESPECTFULLY PRAYS THIS COURT TO ORDER, ADJUDGE, AND DECREE that:

1. Evan L. Hultman, United States Attorney, Northern District of Iowa, while Attorney General for the above-named Defendant State of Iowa, represented Defendant State of Iowa in the District Court of Iowa, Monona County, in litigation, the subject *res* of which was the title to lands referred to as the Blackbird Bend Area, which lands are graphically displayed on Appendix A of the Verified Statement and specifically described in Appendix D, which is comprised of copies of pleadings in the State Court cases in which Evan L. Hultman participated as Attorney General for and on behalf of Defendant State of Iowa, and in that capacity:

(a) Acknowledged title in and disclaimed title to Defendant Charles E. Lakin, a present owner of land in the Blackbird Bend Area, who is predecessor

in interest of Defendant Roy Tibbals Wilson, now Defendant John R. Wilson, who claims title adversely to Plaintiff Omaha Indian Tribe to a substantial portion of the lands in the Blackbird Bend Area.[1]

(b) Acknowledged title in and disclaimed title to Raymond G. Peterson, the predecessor in interest of Defendant R.G.P., Inc.,[2] who claims title adversely to Plaintiff Tribe to a substantial portion of the lands in the Blackbird Bend Area;

(c) Claimed title in and retained title for Defendant State of Iowa in lands title to which is claimed by Defendant State of Iowa, adversely to Plaintiff Omaha Indian Tribe in the Blackbird Bend Area.[3]

2. Evan L. Hultman, as United States Attorney for the Northern District of Iowa, filed on May 19, 1975, a Complaint to Quiet Title and for Injunctive Relief,[4] allegedly on behalf of Plaintiff Omaha Indian Tribe, in which Complaint there is described a portion of the Blackbird Bend Area which is identical to and precisely the same land as that which:

(a) Evan L. Hultman, as Attorney General for Defendant State of Iowa acknowledged title in and disclaimed title to Defendant Charles E. Lakin, Defendant Roy Tibbals Wilson, now John R. Wilson, and Raymond G. Peterson, predecessor of Defendant R.G.P., Inc.;[5]

(b) Evan L. Hultman, as Attorney General, claimed title in and retained title for Defendant State of Iowa, title to which lands are claimed by

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[1] Verified Statement, p.3, para. 3, *et seq.*; Appendix G, Affidavit of Elmer M. Clark, p.3, para. 10; p.5, para. 12.

[2] *See*, Verified Statement, p. 5, para. 5, *et seq.*; Appendix B. Affidavit of Elmer M. Clark, p. 4, para. 11

[3] Verified Statement, p. 4, Plate II; p. 5, Plate III; and statements on p. 3, para. 3, *et seq.*

[4] *See*, Appendix B, Affidavit of Elmer M. Clark, p. 7, para. 21, analysis of May 19, 1975 Complaint, with copy attached.

[5] *Supra.*, para. 1, *et seq.*

Defendant State of Iowa adversely to Plaintiff Omaha Indian Tribe in the Blackbird Bend Area;[6]

(c) Evan L. Hultman, as United States Attorney, constricted the claim on behalf of Plaintiff Omaha Indian Tribe in the May 19, 1975 Complaint to a portion of the lands within the 1867 Barrett Meander Line, all as displayed on Appendix A and as set forth in the copy of the Complaint, which is attached to the Affidavit of Elmer M. Clark, Appendix B of the Verified Statement. Evan L. Hultman made no claim on behalf of Plaintiff Omaha Indian Tribe to the extensive accretions to the Blackbird Bend lands but rather claimed—totally without meaning—" . . . all lands in the bed of the Missouri River as it existed when the Omaha Indian Reservation was created [in 1854] . . . ." Evan L. Hultman further "excepted" from Sections 11 and 14, T. 24 N., R. 10 E., 6th P.M. lands title to which he had acknowledged in and disclaimed to Defendants Lakin, Wilson, and predecessors of Defendant R.G.P., Inc.[7]

3. Evan L. Hultman, as agent of the United States of America Trustee, acted beyond the scope of his authority as United States Attorney and violated his trust obligation (1) by purporting to represent Plaintiff Omaha Indian Tribe in C 75-4024 when he had previously represented Defendant State of Iowa involving precisely the same lands—described in the May 19, 1975 Complaint—title to which he had claimed on behalf of Defendant State of Iowa and had further acknowledged and conceded title in Defendants Lakin, Wilson, and R.G.P., Inc.; (2) by failing to inform Plaintiff Omaha Indian Tribe of his previous representation of the above-named Defendants in litigation involving the Blackbird Bend Area; and (3) by violating the Code of Professional Responsibility, including but not limited to Canon 9

[6] Verified Statement, p. 6, para. 6.

[7] *See, supra.*, para. 1, *et seq.*, Verified Statement, p. 6, para. 6, *et seq.*, Inset 2, p.7.

which declares that "A lawyer should avoid even the appearance of professional impropriety."

4. Evan L. Hultman, United States Attorney, on December 20, 1985, filed an Opposition to Plaintiff Omaha Indian Tribe's November 7, 1985 "Motion to Disqualify . . . Evan L. Hultman . . .," which Opposition failed adequately to respond to the charges made in that Motion against Mr. Hultman.

5. Myles E. Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, was specifically charged by Plaintiff Omaha Indian Tribe in its November 7, 1985 "Motion to Disqualify . . ." of violating its title in the Blackbird Bend Area by participating in the preparation of the May 19, 1975 Complaint filed by Evan L. Hultman. Mr Flint failed to respond to those charges.[8]

6. Myles E. Flint was specifically informed by Elmer M. Clark, all as set forth in Mr. Clark's Affidavit, prior to the filing of the May 19, 1975 Complaint, that the Complaint must include accretions to the lands encompassed within the 1867 Barrett Meander Line and was, moreover, informed by Elmer M. Clark and Mr. Charles P. Corke, Bureau of Indian Affairs, that preparation had not proceeded sufficiently for the Department of Justice properly to prepare a complaint which would adequately set forth the claims of Plaintiff Tribe to title to the Blackbird Bend lands.[9]

7. Myles E. Flint violated the trust obligation owing by him to Plaintiff Omaha Indian Tribe by the United States of America Trustee and in so doing acted beyond the scope of his authority and violated the Canon of Professional Responsibility.

8. James J. Clear, Attorney, Indian Resources Section, Land and Natural Resources Division, Department

[8] *See*, November 7, 1985 "Motion to Disqualify . . . ," p. 7, para. IX, *et seq.*

[9] Appendix B, Affidavit of Elmer M. Clark, p. 8, para. 25, *et seq.*

of Justice, was extensively and comprehensively charged in the November 7, 1985 "Motion to Disqualify . . . ," and intentionally and knowingly failed to respond to the charges contained in that Motion.[10]

9. Mr. Clear violated the trust obligation owing by him to Plaintiff Omaha Indian Tribe by the United States of America Trustee for Omaha Indian Tribe and in so doing acted beyond the scope of his authority and violated the Canons of Professional Responsibility.

10. Plaintiff Omaha Indian Tribe, on October 6, 1975, filed with this Court its Complaint in the case of *Omaha Indian Tribe vs. Charles E. Lakin, R.G.P., Inc., Harold Sorenson, et al., State of Iowa,* and *Roy Tibbals Wilson,* now John R. Wilson, . . . *et al.,* C75-4067, in which Plaintiff Tribe, among other things, claimed title to the full 6390 acres within the Blackbird Bend Area against those Defendants. The Tribe's Complaint in C 75-4067 encompasses all of the lands described in the Hultman Complaint of May 19, 1975, all of the lands excepted in that Complaint, all of the lands omitted in that Complaint, and specifically named Harold Sorenson as a Defendant who was omitted from the Hultman Complaint.

11. Defendant Roy Tibbals Wilson, now John R. Wilson, was joined by Defendant Charles E. Lakin in answering Plaintiff Tribe's Complaint, declaring, among other things, that the Blackbird Bend Area, not limited to the lands within the 1867 Barrett Meander Line, were totally eroded away and replaced by accretions to the left or Iowa bank of the Missouri River.[11] An answer, virtually identical with that filed by Defendants Wilson and Lakin, was likewise filed by Defendants R.G.P., Inc.[12] Defendant State of Iowa, by its Answer, declared that the Blackbird Bend Area had been totally washed away and ceased to exist.[13] None of the Defendants

[10] *See,* "Motion to Disqualify . . . ," p. 30, para. XLII, *et seq.*
[11] Answer, dated February 5, 1976, para. 8, Docket No. 78.
[12] Answer, dated July 15, 1976, para. 8, Docket No. 76.
[13] Answer, dated January 5, 1976, para. 42, Docket No. 46.

claimed land other than as part of the full 6390 acres in the Blackbird Bend Area.

12. All of the evidence offered by all of the parties, including the Department of Justice, pertained to the 6390 acres and was not limited to the lands constricted within the 1867 Barrett Meander Line or the lands described in the May 19, 1975 Hultman Complaint.[14]

13. Elmer M. Clark reviewed the pleadings and all of the evidence of the above-named Defendants, and states under oath that all the evidence and pleadings—with the exception of the May 19, 1975 Complaint—related to the entire 6390 acres.[15]

14. Due to the improprieties of Messrs. Evan L. Hultman, Myles E. Flint, and James J. Clear, it would be grossly inequitable and unconscionable to constrict Plaintiff Tribe's claims to the area described in the May 19, 1975 Complaint. Messrs. Hultman, Flint, Clear and their successors in the Department of Justice are enjoined from further participation in the litigation involving the subject *res*—title to the 6390 acres within the Blackbird Bend Area.

15. Due to the fact that the pleadings of the principal parties, with the exception of the Department of Justice, and all of the evidence offered by all of the parties, including the Department of Justice, pertained to the entire Blackbird Bend Area, as depicted on Appendix A of the Verified Statement, all of the following named parties, Plaintiff Omaha Indian Tribe, Defendant John R. Wilson, Defendant R.G.P., Inc. Defendant State of Iowa, Defendant State of Iowa Conservation Commission and Defendant Harold Sorenson, *et al.*, have had their full day in Court, relative to their respective claims to title within the Blackbird Bend Area.

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[14] Principal Defendants Wilson and R.G.P., Inc. offered the vast preponderance of evidence respecting their claims. The evidence offered by those defendants was largely adopted by Defendants Iowa and Sorenson.

[15] Appendix B, Affidavit of Elmer M. Clark, p. 9, para. 27, lns. 22-26; p. 10, lns. 1-26; p. 11, para. 29, lns. 1-13.

16. Predicated upon the present record in the case, a final judgment respecting the parties named in the paragraph immediately preceding shall be entered by this Court. That final judgment will have no bearing upon or in any sense relate to the other Defendants in the Blackbird Bend Area who did not participate in the trial on the merits.

Plaintiff Tribe prays for such other and additional relief as may be appropriate under the circumstances.

Respectfully submitted,

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
[202] 466-3890

Attorney for
Omaha Indian Tribe

Dated January 6, 1986

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON [JOHN R. WILSON]; CHARLES E. LAKIN; FLORENCE LAKIN; R.G.P., INCORPORATED, an Iowa Corporation; HAROLD JACKSON; OTIS PETERSON; TRAVELERS INSURANCE COMPANY and the STATE OF IOWA, *et al.*, — 75-4024

Defendants.

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

JACKSON, HAROLD; PETERSON, OTIS; DISTRICT COURT IN AND FOR MONONA COUNTY, IOWA; ROY TIBBALS WISLON [JOHN R. WILSON] and CHARLES LAKIN, — 75-4026

Defendants.

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

DEFENDANTS: TRACT I—BLACKBIRD BEND AREA—

JACKSON, HAROLD; LAKIN, CHARLES E. and FLORENCE; PETERSON, OTIS; R.G.P., INC.; SORENSON, DARRELL, HAROLD, and LUEA; STATE OF IOWA; TRAVELERS INSURANCE COMPANY and WILSON, ROY TIBBALS [JOHN R. WILSON], *et al.*, — 75-4067

"AFFIDAVIT OF ELMER M. CLARK, REGISTERED LAND SURVEYOR, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Elmer M. Clark, being first duly sworn, upon my oath depose and say that:

1. I am a registered Land Surveyor, authorized to conduct land surveys in the State of Iowa as a Registered Land Surveyor, I have intensively investigated the lands within the Blackbird Bend Area, referred to in the Motion for Summary Judgment, and I prepared the Plate, Appendix A, attached to that Summary Judgment and personally know that the specific locations appearing on Appendix A are correct to my personal knowledge;

2. I testified as the principal witness for the Omaha Indian Tribe in the trial on the merits and, as an expert cadastral surveyor and river morphologist, I testified as to the precise location of the tracts of land referred to on Appendix A, including but not limited to the lands title to which is claimed by (1) Defendant State of Iowa, (2) Charles E. Lakin, (3) Defendant R.G.P., Inc., and (4) Defendant Harold Sorenson;

3. I likewise prepared the land descriptions for the "Easterly High Bank" and the "Northerly High Bank" and personally established the location of those natural monuments, all as set forth in the Opinion of the United States Court of Appeals for the Eighth Circuit in the case of *Omaha Indian Tribe* v. *Roy Tibbals Wilson, . . .* State of Iowa . . . *et al.*, Defendants/Appellees, 575 F. 2d 620, 624 (CA 8, 1978);

4. I likewise prepared the following Plates adopted by the Court of Appeals for the Eighth Circuit in the last-mentioned decision: Plate I, p. 625; Plate II, p. 626; and Plates III and IV, p. 627;

5. I likewise prepared the following Exhibits set forth in this Court's Opinion, dated September 4, 1981,

Omaha Indian Tribe v. *Agricultural Industrial & Investment Co., et al.*, 523 F. Supp. 874 (U.S.D.C.N.D. Iowa W.D. 1981), Plate 1, p. 882; Plate 2, p. 883; Plate 3, p. 884; Plate 4, p. 885; Plate 5, p. 886; Plate 6, p. 887; Plate 7, p. 888; and Plate 8, p. 889;

6. I likewise prepared Plate I set forth in the Opinion of the United States Court of Appeals for the Eighth Circuit, *United States* v. *Wilson, et al.*, 707 F.2d 304, 308 (CA 8, 1983);

7. I supplied counsel for the Omaha Indian Tribe with technical information in regard to the preparation of the November 7, 1985 "Motion of Omaha Indian Tribe to Have Disqualified and To Enjoin Evan L. Hultman, United States Attorney; James J. Clear, Successors . . . " hereafter referred to as Plaintiff Tribe's November 7, 1985 Motion;

8. In connection with Plaintiff Tribe's November 7, 1985 Motion, I personally prepared and certify to the accuracy of the locations, acreages, and parties mentioned in the following Insets and Plates set forth in that Motion: Inset 1, p. 5; Plate I, p. 9, which is Appendix A of the Motion for Summary Judgment of which this Affidavit is in Support; Inset 2, p. 14; Plate II, p. 16; Plate III, p. 17; Inset 3, p. 18; Plate IV, p. 25; and Inset 4, p. 35, which is Plate III of the Opinion of the United States Court of Appeals for the Eighth Circuit, *Omaha* v. *Wilson*, 575 F.2d 620, 627 (CA 8, 1978), referred to above.

9. I certify as to the accuracy of the locations of the lands "excepted" as set forth in the complaint filed May 19, 1975, in this Court by the Department of Justice with particular reference to the "Arable Lands" contained in Sections 11 and 14, To 24N., R. 10E., 6th P.M., all as referred to in Inset 2 of p. 14 of Plaintiff Tribe's November 7, 1985 Motion;

10. I certify to the accuracy of the location of the exterior boundaries heavily delineated on Plate II, p. 16

of Plaintiff Tribe's November 7, 1985 Motion which precisely depicts the lands described in the document entitled "Amendment to Petition" in the case of *Charles E. Lakin*, Plaintiff, v. *State of Iowa*, Defendant, in the District Court of Iowa, in and for Monona County, which Amended Petition is part of Appendix A of the November 7, 1985 Motion;

[*See*, Appendices 6c, 6d, 6e which follow: Petition *Lakin v. Iowa*, Answer and Disclaimer Iowa; Petition *Peterson v. Iowa*, Answer Iowa.]

11. I certify to the accuracy of the location of the exterior boundaries heavily delineated on Plat III, p. 17 of Plaintiff Tribe's November 7, 1985 Motion, all as described in the Petition in the case of *Raymond G. Peterson*, Plaintiff v. *State of Iowa, et al.*, in the District Court of Iowa in and for the Monona County, which Petition is part of Appendix B of Plaintiff Tribe's November 7, 1985 Motion;

12. I certify as to the accuracy of the location of the exterior boundaries of the lands described in the Quit Claim Deed dated May 25, 1965, from Raymond G. Peterson to the State of Iowa, Inset 3, p.18 of Plaintiff Tribe's November 7, 1985 Motion; and I moreover certify as to the accuracy of the location of the exterior boundaries of the lands described in the Quit Claim Deed dated May 28, 1965, from Charles E. Lakin and wife to the State of Iowa, also set forth in Inset 3, p. 18;[1]

13. I attach to this Affidavit and incorporate into it by reference each of the pages of Plaintiff Tribe's November 7, 1985 Motion to which I refer in paragraphs VIII and IX, pages 5 thru 8, and make those pages part of this Affidavit, together with the attached insets and plates prepared by me;

14. I further state under oath that I was employed by the Bureau of Indian Affairs intensively to study and

[1] I deny the propriety of utilizing Iowa 5th P.M. legal descriptions superimposed upon Nebraska 6th P.M. surveys

prepare data and information in supoprt of the claims of the Omaha Indian Tribe to lands in the Blackbird Bend Area. In conducting that investigation, I certify that I met and fully discussed the claims of the Omaha Indian Tribe with Donald E. O'Brien, attorney for the Omaha Indian Tribe at that time. Mr. O'Brien, now Chief Judge O'Brien, supplied to the Omaha Indian Tribe documentation prepared by him in support of their claims in and to the lands in question. Part of the data and information supplied by Donald E. O'Brien included, but was not limited to, the pleadings referred to by me in paragraphs 10 and 11, involving quiet title actions against Defendant State of Iowa by Defendants Charles E. Lakin and wife and Raymond G. Peterson, predecessor of Defendant R.G.P., Inc.;

15. I further state under oath that, utilizing the data supplied to the Omaha Indian Tribe by Donald E. O'Brien, my own investigations in the records of Monona County, State of Iowa, and the title data supplied by the defendants during the trial on the merits, I traced the title to each tract of land within the Blackbird Bend Area and determined that none of the titles asserted in the Blackbird Bend cases by the defendants was derived from patents issued by the United States;

16. I state under oath that as a Registered Surveyor I determined that the only official survey ever conducted by the United States of America within the present Blackbird Bend Area was the Barrett Survey of 1867 which pertained only to lands then situated in the State of Nebraska in Township 24 North, Ranges 10 and 11 East of the 6th Principal Meridian; [2]

17. I state under oath that Jack Virtue, Surveyor, Onawa, Iowa, superimposed nonexistent Iowa descriptions throughout the entire Blackbird Bend Area, including but not limited to the area surveyed by Barrett in 1867. I personally know, as a registered land surveyor,

[2] A possible irrelevant exception could be the 1929 Peterson retracement survey for a portion of Section 24, T. 84 N., R. 47 W., 5th P.M.

that it is illegal for a private surveyor to undertake to obliterate or supercede an official survey conducted by the United States of America and that it is equally illegal to attempt to extend the 5th P.M. Iowa survey across the Blackbird Bend Area, particularly as it relates to the subdivision of Indian lands officially surveyed by Barrett in 1867;

18. I further state under oath that in my investigations of chains of title for each tract of land within the Blackbird Bend Area I found that Defendant State of Iowa, acting by and through Evan L. Hultman, Attorney General for Defendant State of Iowa, disclaimed title to Charles E. Lakin to virtually all of the arable lands in the South Half of the Blackbird Bend Area, both inside and outside the Barrett Meander Line, with the result that Defendant State of Iowa, acting through Evan L. Hultman, Attorney General for the State of Iowa, acknowleged title in Defendant Charles E. Lakin, who subsequently conveyed a substantial portion of that land to Defendant Roy Tibbals Wilson;

19. I further state under oath that Evan L. Hultman, as Attorney General for the State of Iowa, all as revealed by my search of the title to the lands claimed by Defendant R.G.P., Inc., revealed that the State of Iowa, acting by and through Evan L. Hultman and Mr. Hultman's successor, disclaimed title to a large proportion of the Northern Half of the Blackbird Bend Area, both inside and outside the Barrett Meander Line, to reside in Raymond G. Peterson;

20. I further state under oath that my investigations of the lands disclaimed by Raymond G. Peterson and Charles E. Lakin to the State of Iowa involved only non-arable lands and did not include arable lands of the character relinquished by Defendant State of Iowa to Charles E. Lakin and Raymond G. Peterson, all as reviewed above. In that connection, my investigations further revealed that Defendant State of Iowa claims only non-arable lands situated west of the lands disclaimed to

Lakin and Peterson, all as set forth on Inset 2, p. 14 and Inset 3, p. 18, copies of which are attached to this Affidavit, and referred to in paragraph 8 above;

21. I state under oath that I have carefully reviewed the land descriptions set forth in the May 19, 1975, Complaint to Quiet Title and Injunctive Relief, copy of which is hereto attached, filed by Evan L. Hultman, United States Attorney, and I find that the "excepted" lands in Section 11, T. 24 N., R. 10 E., 6th P.M. set forth in that Complaint include arable land previously disclaimed by Evan L. Hultman, as Attorney General for Defendant State of Iowa, to Raymond G. Peterson, predecessor in interest to Defendant R.G.P., Inc. and that the lands "excepted" in the May 19, 1975 Complaint in Section 14, T. 24 N., R. 10 E., of the 6th P.M. include arable land previously disclaimed by Evan L. Hultman, Attorney General to Charles E. Lakin who continues to claim a portion of those disclaimed lands, the balance of those disclaimed lands having been sold and transferred by Defendant Charles E. Lakin to Defendant Roy Tibbals Wilson [now John R. Wilson]. Those lands are graphically displayed on page 14, Inset 2, of Plaintiff Tribe's November 7, 1985 Motion, a copy of which page is attached to this Affidavit and referred to in paragraph 9 above;

21. I state under oath that I have carefully reviewed the land descriptions set forth in the May 19, 1975, Complaint to Quiet Title and Injunctive Relief, copy of which is hereto attached, filed by Evan L. Hultman, United States Attorney, and I find that the "excepted" lands in Section 11, T. 24 N., R. 10 E., 6th P.M. set forth in that Complaint include arable land previously disclaimed by Evan L. Hultman, as Attorney General for Defendant State of Iowa, to Raymond G. Peterson, predecessor in interest to Defendant R.G.P., Inc. and that the lands "excepted" in the May 19, 1975 Complaint in Section 14, T. 24 N., R. 10 E., of the 6th P.M. include arable land previously disclaimed by Evan L. Hultman, Attorney General to Charles E. Lakin who continues to

claim a portion of those disclaimed lands, the balance of those disclaimed lands having been sold and transferred by Defendant Charles E. Lakin to Defendant Roy Tibbals Wilson [now John R. Wilson]. Those lands are graphically displayed on page 14, Inset 2, of Plaintiff Tribe's November 7, 1985 Motion, a copy of which page is attached to this Affidavit and referred to in paragraph 9 above;

22. I further state under oath that part of my investigation respecting title to the Blackbird Bend Lands claimed by the Omaha Indian Tribe involved comprehensive discussions not only with Donald E. O'Brien, then attorney for the Omaha Indian Tribe, but likewise with officials in the Bureau of Indian Affairs, Washington, D.C., members of the Solicitors Office of the Department of the Interior, and attorneys in the Department of Justice;

23. I further state under oath that on April 23, 1975, I met with the Deputy Commissioner of Indian Affairs, Harley Frankel, members of the Solicitors Office, Mr. Corke, the designated representative of the Bureau of Indian Affairs in the Blackbird Bend litigation, and Mr. Veeder, then consultant for the Bureau of Indian Affairs, and reviewed at length the posture of the investigation I was conducting in connection with the title of the Omaha Indian Tribe in and to Blackbird Bend Area. At that meeting I stressed that the work had not been completed but that the claims of the Omaha Indian Tribe extended far beyond the Barrett Meander Line of 1867. I established that fact by locating the Barrett Meander Line as related to the much larger tract of land comprising the entire Blackbird Bend Area as appeared on the aerial photography.

24. I state under oath that on April 24, 1975, I met with Associate Solicitor for Indian Affairs, Mr. Reid Chambers, members of his staff, Mr. Corke and Mr, Veeder. Again I stressed the progress of the investigation that I had undertaken for the Omaha Indian Tribe and

pointed out the need for additional investigation, prior to taking any legal action;

25. Likewise, under oath, I state that on April 25, 1975, I met with Mr. Floyd France, Chief, General Litigation Section, Department of Justice, and Myles E. Flint, Deputy to Mr. France, who, I was informed, was primarily responsible for the ongoing work being conducted by the Department of Justice in preparation for the Blackbird Bend litigation on behalf of the Omaha Indian Tribe. I attended that meeting with Mr. Corke of the Bureau of Indian Affairs. Likewise present were attorneys for the Solicitors Office of the Department of the Interior. Mr. Corke and I, at that April 25, 1975, meeting, stressed in particular to Myles E. Flint that the title of the Omaha Indian Tribe could not be limited to the 1867 Barrett Meander Line but necessarily included accretions to those lands stressing, moreover, that the Missouri River had progressed by the process of erosion and accretion far beyond the constricted area of the Barrett Meander Line. Mr. Corke and I discussed particularly with Mr. Flint not only that the river had moved by accretion but that, under the Treaty of 1854, the Tribe's title to the land extended to the "centre" of the Missouri River. I also personally discussed with Mr. Flint the fact that the 1867 Barrett Meander Line was not and could not be considered a boundary line but is only a high water line along the right bank of the Missouri River at flood stage which could not effect the magnitude of the claims of the Omaha Indian Tribe's title to the Blackbird Bend lands.

26. I likewise state under oath that Mr. Flint was advised by me that, while I had sufficient information to establish title of the Omaha Indian Tribe far beyond the Barrett 1867 Meander Line, I had not completed the studies to the full extent of the Blackbird Bend Area and that it would be improper to file a Complaint to quiet title to only the lands within the Barrett Meander Line by reason of the fact that the Tribe's claim should encompass all lands to the fullest extent possible within

Blackbird Bend Area. (See attached p. 5 and p. 6 of this Affidavit.).

27. I state under oath that, as a principal expert witness testifying as to all aspects of the Tribe's claim to title involving the Missouri River morphology as it pertains to the Blackbird Bend Area and as to all phases of cadastral surveys, I was assigned the obligation of considering the respective claims of Defendants Roy Tibbals Wilson, R.G.P., Inc., Harold Sorenson, the State of Iowa, and State of Iowa Conservation Commission as set forth in their respective answers to the Complaints filed by Plaintiff Omaha Indian Tribe and the Department of Justice. I was likewise charged with the responsibility of reviewing the transcripts of the record of all of the testimony of all of the expert witnessess called by all parties and to examine all of the exhibits offered in evidence by all of the parties, and to compare those exhibits with the exhibits prepared by me on behalf of the Omaha Indian Tribe. I found as a fact that all of the Defendants in support of their respective claims to title offered evidence respecting all of the land within the Blackbird Bend Area and made no claim whatever, limiting their titles by reason of the 1867 Barrett Meander Line. As reviewed above, Defendent Iowa's claim to title was predicated strictly upon quit claim deeds from Defendant Charles E. Lakin and Raymond G. Peterson, predecessors in interest of Defendant R.G.P., Inc.:

28. I likewise state under oath that in the Quiet Title Proceedings the Department of Justic is the only party that constricted their claim in the Blackbird Bend case to the 1867 Barrett Meander Line.

> ". . . .In addition to the above described lands, the plaintiff claims for the use and benefit of the Omaha Tribe of Indians all lands in the bed of the Missouri River as it existed when the Omaha Indian Reservation was created extending from the lands described to the center of the main channel of the River."

The above quoted language is totally without meaning. Based upon my personal investigations all of the maps of the Missouri River, as they relate to the Blackbird Bend Area, establish the many drastic changes in this river's course. By utilizing that language the Department of Justice abandoned 3,490 acres of accretions to the Blackbird Bend meander lobe.

29. I likewise state under oath, having testified extensively at the trial on the merits and having been present throughout the entire trial on the merits and having intensely studied the entire record of all oral and documentary evidence, including all exhibits, that all of the testimony and all of the exhibits pertained to the full 6,390 acres of land within the Blackbird Bend Area and none of the evidence, oral or documentary, purported to constrict the claims of the parties to the lands within the Barrett Meander Line, with the exception of the Department of Justice. Irrespective, however, of the fact that the Department of Justice constricted the Tribe's *claim* to title to the Barrett Meander Line, and seeks judgment limited to that line, nevertheless, all of the evidence offered by the Department of Justice pertained to the entire Blackbird Bend Area, extending from the Northerly and Easterly High Banks, totalling 6,390 acres.

Dated January 3, 1986

Elmer M. Clark

Subscribed and sworn to before me this 3rd day of January, 1986.

SUE F. WIELEHAFT

Notary Public

My commission expires December 19, 1989

APPENDIX Q

IN THE
DISTRICT COURT OF IOWA,
IN AND FOR MONONA COUNTY
****

CHARLES E. LAKIN

Plaintiff

VS.

STATE OF IOWA, MONONA COUNTY, IOWA, *et al...*

(17400)

PETITION IN EQUITY

8. Plaintiff is credibly informed and believes that various and numerous unknown persons claim to have some interest in said real estate, or parts thereof, adverse to this plaintiff, and that said unknown persons are made parties defendant hereto under the designation of Unknown Claimants. That plaintiff has used all available means to ascertain what claims are made and by whom, but that this plaintiff is unable to more definitely state the interest or interests the said unknown claimants claim to have other wise than as set forth in this petition, and plaintiff alleges that any right, title or interest that they or any of them may have ever had or may claim to have in said real estate would be as the surviving spouse, heirs, devisees, legatees, mortgagees, grantees, assignees, or representatives of the remote grantors of the plaintiff, or any of the defendants named in the caption of this petition, or as the successors in interest to some of the classes or persons herein mentioned.

9. Plaintiff alleges that the names and residences of the said unknown Claimants, and each and all of them, are unknown to this plaintiff, and plaintiff has sought diligently to learn the same and has been able to do so.

. . . this plaintiff, and that this plaintiff be decreed to be the absolute owner in fee-simple of the above described real estate and be entitled to the quiet and peaceful

possession thereof, except only as to the rights of his vendors named in paragraph two of this petition, and that said title be forever quieted in said plaintiff as against all claims of the defendants, and each and all of them, and for such other and further relief as the court may deem equitable in the premises.

/s/ Prichard & Prichard

Prichard & Prichard
of Onawa, Iowa

/s/ K. C. Acrea

K. C. Acrea
of Missouri Valley, Iowa

ATTORNEYS FOR PLAINTIFF

IN THE
DISTRICT COURT OF IOWA,

IN AND FOR MONONA COUNTY

CHARLES E. LAKIN, EQUITY NO. 17400

Plaintiff,

vs.

STATE OF IOWA, ET ALS., AMENDMENT TO PETITION

Defendants,

COMES NOW, Charles E. Lakin, plaintiff, and for amendment to his petition, states:

1. That since the filing of his petition in this action some adjustments have been made with adjoining owners as to the exact boundary lines of plaintiff's property and plaintiff alleges that the true and correct description of the real estate owned by him, as adjusted, is as follows, to-wit:

That part of sections, or projected sections, Thirty (30), Thirty-one (31), Thirty-two (32) and Thirty-three (33), Township Eighty-four (84) North, Range Fourty-six (46) West of the 5th P.M., Sections Twenty-five (25) and Thirty-six (36), Township Eighty-four (84) North, Range Forty-seven (47) West of the 5th P.M., Section Six (6), Township Eighty-three (83) North, Range Forty-six (46) West of the 5th P.M. and Section One (1), Township Eighty-three (83) North, Range Forty-seven (47) West of the 5th P.M., all situated in Monona County, Iowa and bounded as follows:

Commencing at a point which is 1324.5 feet due West and 12.55 feet north of the Southeast corner of Section Thirty-three (33), Township Eighty-four (84) North, Range Forty-six (46) West

of the 5th P.M., in Monona County, Iowa, (which point is marked by a wooden railroad tie); thence in a westerly direction 675.5 feet to a point which is 2000 feet west and 16.1 feet north of the Southeast corner of said Section Thirty-three (33), thence in a westerly direction 598 feet to a point which is 2590 feet west and 24.5 feet north of the Southeast corner of said Section Thirty-three (33) (which point is marked by a corner post of the existing North-South Property Line Fence); thence in a westerly direction 640.6 feet to a point which is 3238.4 feet west and 34.2 feet north of the Southeast corner of said Section Thirty-three (33), thence in a westerly direction 229.2 feet to a point which is 28.9 feet north and 3467.5 feet west of the Southeast corner of said Section Thirty-three (33), (said point being marked by a corner fence post) thence in a westerly direction 437.6 feet to a point which is 17.5 feet north and 3905.0 feet west of the Southeast corner of said Section Thirty-three (33), thence in a northerly direction 277 feet to a point which is 294.5 feet north and 3908.4 feet west of the Southeast corner of said Section Thirty-three (33), thence in a southwesterly direction 1289.2 feet to a point which is 5163.5 feet due west of the Southeast corner of said Section Thirty-three (33), thence due west 1360.81 feet to the Northeast corner of the Northwest Quarter of the Northeast Quarter (NW¼ NE¼) of Section Five (5), Township Eighty-three (83) North, Range Forty-six (46) West of the 5th P.M., which point is 6524.32 feet due west of the Southeast corner of Section Thirty-three (33), Township Eighty-four (84) North, Range Fourty-six (46) West of the 5th P.M., thence North 110.60 feet. thence north 80°40′40″ West 4393.53 feet to the left bank of the Missouri River as established in 1943 thence South 19°6′0″ west a distance of 350 feet to the Iowa-Nebraska Compromise Boundary Line of 1943; thence in a westerly direction following said boundary line to a point

which is 117.43 feet north and 1365.40 feet east of the projected southwest corner of section Thirty-one (31), Township Eighty-four (84) North, Range Fourty-six (46), West of the 5th P.M., thence North 39°28′30″ West a distance of 612.0 feet, thence North 45°11′00″ West a distance of 424.94 feet, thence North 66°57′30″ West a distance of 332.51 feet, thence South 81°40′00″ West a distance of 141.16 feet, thence South 62°23′30″ West a distance of 151.12 feet; thence South 49°37′30″ West a distance of 257.35 feet, thence South 78°31′30″ West a distance of 166.49 feet, thence North 82°31′00″ West a distance of 572.90 feet, thence North 67°29′30″ West a distance of 256.94 feet, thence North 57°44′30″ West a distance of 466.86 feet, thence North 41°54′30″ West a distance of 513.62 feet, thence North 9°46′30″ West a distance of 754.32 feet, thence North 10°38′30″ West a distance of 546.48 feet, thence North 24°19′30″ West a distance of 271.25 feet, thence North 41°30′30″ West a distance of 222.23 feet, thence North 67°20′00″ West a distance of 415.31 feet, thence North 61°37′30″ West a distance of 274.63 feet, thence North 71°58′30″ West a distance of 351.45 feet, thence North 52°33′00″ West a distance of 406.25 feet, thence North 50°41′30″ East a distance of 21.16 feet, thence North 60°42′30″ East a distance of 135.69 feet, thence North 46°10′30″ East a distance of 122.15 feet, thence North 16°45′30″ East a distance of 207.93 feet, thence North 4°38′30″ West a distance of 155.96 feet, thence North 17°02′30″ West a distance of 377.48 feet, thence North 20°49′00″ West a distance of 159.95 feet, thence North 01°12′00″ East a distance of 144.98 feet, thence North 09°02′30″ West a distance of 177.97 feet, thence North 14°24′30″ West a distance of 194.62 feet, thence North 04°56′30″ East a distance of 102.30 feet, thence North 08°51′30″ East a distance of 122.95 feet, thence North 02°26′30″ West a dis-

tance of 234.50 feet, thence North 03°57′30″ West a distance of 153.15 feet, thence North 02°02′30″ East a distance of 146.55 feet, thence North 09°06′30″ East a distance of 255.69 feet, thence north 08°20′30″ East a distance of 14.61 feet to a point which is 3543.5 feet due west of the Northeast corner of the Southeast Quarter of the Southeast Quarter (SE½SE¼) of Section Twenty-five (25), Township Eighty-four (84) North, Range Forty-seven (47) West of the 5th P.M., thence due east 3543.5 feet, thence East a distance of seven-sixteenths (7/16ths) of a mile to the northwest corner of the east ten (10) acres of the Southeast Quarter of the Southeast Quarter (SE¼SW¼) of projected Section Thirty (30), Township Eighty-four (84) North, Range Forty-six (46) West of the 5th P.M., thence south one-quarter (¼) mile to the projection of the line between Sections Twenty-eight (28) and Thirty-three (33) projected west, thence east along said projected line to the North Quarter corner of Section Thirty-three (33), Township Eighty-four (84) North, Range Forty-six (46) West of the 5th P.M., thence east along the North section line of said Section Thirty-three (33) a distance of 24 feet to the existing fence, thence South 3°34′40″ West 716.2 feet, thence South 10°20′00″ East 651.0 feet to the North line of the South Half of the Northeast Quarter (S½NE½) of said Section Thirty-three (33), thence east along the North line of the South Half of the Northeast Quarter (S½NE¼) of said Section Thirty-three (33) to the East line of said Section Thirty-three (33), thence south along the said section line to the East Quarter corner of said Section Thirty-three (33), thence West one-quarter (¼) mile, thence south one-half (½) mile to the point of beginning.

2. Plaintiff reaffirms the other allegations contained in his petition.

WHEREFORE, plaintiff prays that his title and estate in and to the real estate described in paragraph one (1) of this

amendment to his petition be established in plaintiff against the adverse claims of the defendants, and that each and all of them, and all persons claiming by, through or under them, or any of them, be forever barred and estopped from having or claiming, to have any right, title or interest in and to said real estate adverse to this plaintiff, and that this plaintiff be decreed to be the absolute owner in fee simple of the above described real estate and be entitled to the quiet and peaceful possession thereof except only to the rights of his vendors named in paragraph two (2) of his original petition, and that said title be forever quieted in said plaintiff as against all claims of the defendants, and each and all of the, and for such other and further relief as the court may deem equitable in the premises.

PRICHARD & PRICHARD

Prichard & Prichard
of Onawa, Iowa.

K. C. ACREA

K. C. Acrea
of Missouri Valley, Iowa.
Attorneys For Plaintiff.

STATE OF IOWA
MONONA COUNTY } ss.:

I, E. M. Prichard, being first duly sworn, depose and say that I am one of the attorneys for plaintiff; that I am acquainted with the facts contained in the above and foregoing amendment to petition, and that said facts are true as I verily believe.

E. M. PRICHARD

subscribed and sworn to before me this 12 day of November, 1963.

???????? DORREY

Notary Public in and for
Monona County—
State of Iowa

APPENDIX R

IN THE
DISTRICT COURT OF IOWA,
IN AND FOR MONOMA COUNTY

CHARLES E. BAKIN,
Plaintiff,

Equity No. 17400

vs.

STATE OF IOWA, *et al,*
Defendants.

SEPARATE ANSWER
AND
DISCLAIMER BY
DEFENDANT
STATE OF IOWA

Comes now the defendant, State of Iowa, and states to the Court the following:

1. That this answering defendant has heretofore filed a Motion for More Specific Statement in this case. That since the filing of said Motion for More Specific Statement, the plaintiff has filed herein an Amendment to his Petition which constitutes a compliance with this defendant's said Motion for More Specific Statement, and this defendant therefore withdraws its Motion for More Specific Statement heretofore filed.

2. That this defendant admits the allegations of Paragraph 1 of plaintiff's Petition as said allegations are applicable to the real estate now specifically described by plaintiff in Paragraph 1 of his Amendment to Petition.

3. That this defendant admits the allegations of Paragraph 2 of said plaintiff's Petition as said allegations are applicable to said real estate specifically described in Paragraph 1 of his Amendment to Petition.

4. That this defendant admits the allegations of Paragraph 3 of plaintiff's Petition as said allegations are applicable to the real estate specifically described in Paragraph 1 of plaintiff's Amendment to Petition.

5. That this defendant, for answer to Paragraph 4 of plaintiff's Petition hereby states and alleges that it

makes no claim of any right, title, or interest in or to the real estate specifically described in Paragraph 1 of plaintiff's Amendment to Petition, and this defendant hereby disclaims any right or interest in said real estate described in Paragraph 1 of said Amendment.

6. That this defendant for answer to Paragraph 5 of plaintiff's Petition, hereby disclaims any right, title or interest in or to the real estate specifically described in Paragraph 1 of plaintiff's Amendment to Petition.

7. For answer to Paragraph 6 of plaintiff's Petition, this defendant hereby disclaims any right, title or interest in or to the real estate described in Paragraph 1 of plaintiff's Amendment to Petition.

8. That this defendant admits the allegations of Paragraph 7 of plaintiff's Petition.

9. That this defendant for answer to Paragraph 8 of plaintiff's Petition hereby disclaims any right, title or interest in or to the real estate described in Paragraph 1 of plaintiff's Amendment to Petition.

10. That this defendant admits Paragraph 9 of plaintiff's Petition.

11. That this defendant for answer to Paragraph 10 of plaintiff's Petition, hereby disclaims any right, title or interest in or to the real estate specifically described in Paragraph 1 of plaintiff's Amendment to Petition.

WHEREFORE this defendant prays that no judgment for costs or for any other relief be rendered in favor of plaintiff and against this defendant excepting only this defendant hereby consents that a judgment and decree be rendered in favor of plaintiff and against this defendant quieting and establishing title in plaintiff to the real estate specifically described in Paragraph 1 of plaintiff's Amendment to Petition.

EVAN HULTMAN,
Attorney General of Iowa,
State House, Des Moines, Iowa;

WILLIAM J. YOST,
Assistant Attorney General
of Iowa,
State House, Des Moines, Iowa;

---

of Logan, Iowa;

Attorneys for Defendant State
of Iowa

APPENDIX S

IN THE
DISTRICT COURT OF IOWA,
IN AND FOR MONONA COUNTY

RAYMOND G. PETERSON,

Plaintiff, EQUITY NO. 17674

VS PETITION

STATE OF IOWA, MONONA COUNTY, IOWA, GLADYS DURR, WIDOW, GEORGE R. BOULDEN AND FLORENCE BOULDEN, HUSBAND AND WIFE, ETHEL A. PARKS AND WARREN PARKS, WIFE AND HUSBAND, MYRTLE G. RIGGS, SINGLE, VASCO L. BOULDEN, SINGLE, EDNA L. MILLER AND HOWARD MILLER, WIFE AND HUSBAND, ARIEL MOORE VIRTUE AND W. W. VIRTUE, WIFE AND HUSBAND, KENT CRAFORD AND RUTH CRAFORD, HUSBAND AND WIFE, HAROLD M. SORENSON AND LISA SORENSON, HUSBAND AND WIFE, YETTA COX, SINGLE, CLEO COX AND MYRNA COX, HUSBAND AND WIFE, ETHEL MCCOY AND DELBERT MCCOY, WIFE AND HUSBAND, AUGUSTUS CHRISTIE, WILFORD SANFORD, CHARLES C. BALLARD, JAMES CALLANAN, WM. S.T. MARTIN, S. B. MARTIN, C. H. HOLBROOK AND B. D. HOLBROOK, SAMUEL PERRIN, AMERICAN EMIGRANT COMPANY, GEORGE D. WHITNEY, GEORGE ANDERSON, B. A. EVANS, TRUSTEE, W. R. MYERS, IOWA RAILROAD LAND CO., THOMAS C. KENEDY, WILLIAM H. WORSTALL, SAMANTHA A. WRIGHT, G. J. GADD, W. G. BALLARD, AND ALL OF THEIR UNKNOWN HEIRS, DEVISEES, GRANTEES, ASSIGNEES, SUCCESSORS IN INTEREST AND THEIR UNKNOWN SPOUSES, AND THE UNKNOWN CLAIMANTS OF THE FOLLOWING DESCRIBED REAL ESTATE LOCATED IN SECTIONS, OR PROJECTED SECTIONS, NINETEEN (19), TWENTY (20), TWENTY-EIGHT (28), TWENTY-NINE (29), AND THIRTY (30) IN TOWNSHIP EIGHTY-FOUR (84) NORTH, RANGE FORTY-SIX (46) WEST OF THE FIFTH P.M., AND IN SECTIONS TWENTY-FOUR (24) AND TWENTY-FIVE (25), TOWNSHIP EIGHT-FOUR (84) NORTH, RANGE FORTY-SEVEN (47) WEST OF THE FIFTH P.M., ALL SITUATED IN MONONA COUNTY, IOWA AND BOUNDED AS FOLLOWS:

Beginning at the Northwest corner of Section Twenty (20), Township Eighty-four (84) North, Range Forty-six (46)

West of the Fifth P. M., in Monona County, Iowa, thence South along the West line of said Section Twenty (20) one quarter mile to the Northwest corner of the South Half (S½) of the Northwest Quarter (NW¼) of said Section Twenty (20), thence East along the North line of the South Half (S½) of the Northwest Quarter (NW¼) of said Section Twenty (20) one half mile to the longitudinal center line of said Section Twenty (20), thence south along said longitudinal center line one half mile to the Southeast corner of the North half (N½) of the Southwest Quarter (SW¼) of said Section Twenty (20), thence west along the South line of said North Half (N½) of the Southwest Quarter (SW¼) of said Section Twenty (20) one half mile to the West line of said Section Twenty (20), thence South along the West line of said Section Twenty (20) one quarter mile to the Northwest corner of Section Twenty-nine (29), same Township and Range, thence East along the North line of said Section Twenty-nine (29) one quarter mile, thence South three quarters of a mile to the Northeast corner of the Southwest Quarter of the Southwest Quarter (SW¼SW¼) of said Section Twenty-nine (29), thence East three quarters of a mile to the Northeast corner of the Southeast Quarter of the Southeast Quarter (SE¼SE¼) of said Section Twenty-nine (29), thence East on the North line of the South Half (S½) of the Southwest Quarter (SW¼) of Section Twenty-eight (28), same township and Range, one half mile to the longitudinal center line of said section Twenty-eight (28), thence South along said longitudinal center line one quarter mile to the South line of said Section Twenty-eight (28), thence West along the South line of said Section Twenty-eight (28) one half mile to the Southwest corner of said Section Twenty-eight (28) (which includes all of Lot Three (3) of said Section Twenty-eight (28)), thence West along the South line of Section Twenty-nine (29), same Township and Range, one mile to the Southeast corner of Section Thirty (30), same Township and Range, thence West along the South line of said Section Thirty (30) nine sixteenths of a mile to the Southwest corner of the East ten acres of the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of said Section Thirty (30), thence North along the West line of

said East ten acres of the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of said Section Thirty (30) one quarter mile to the North line of said Southeast Quarter of the Southwest Quarter (SE¼SW¼), thence West seven sixteenths of a mile to a Northwest corner of the Southwest Quarter of the Southwest Quarter (SW¼SE¼) of said Section Thirty (30), thence West along the North line of the South Half (S½) of the South Half (S½) of Section Twenty-five (25), Township Eighty-four (84) North, Range Forty-seven (47) West of the Fifth P.M., 3543.5 feet, thence North 08°20′00″ East 242.73 feet, thence North 10°26′00″ East 225.77 feet, thence North 21°36′00″ East 137.83 feet, thence North 35°58′20″ East 130.69 feet, thence North 23°37′20″ East 104.80 feet, thence North 36°32′20″ East 257.73 feet, thence North 19°56′00″ East 298.73 feet, thence North 10°12′00″ East 85.35 feet, thence North 20°59′40″ East 125.24 feet, thence North 14°06′40″ East 294.83 feet, thence North 14°16′40″ East 242.40 feet, thence North 05°55′40″ East 248.81 feet, thence North 14°35′00″ East 163.76 feet, thence North 01°20′00″ East 142.12 feet, thence North 06°30′00″ East 173.51 feet, thence North 02°48′00″ East 257.10 feet, thence North 07°01′40″ West 112.46 feet, thence North 13°40′40″ West 52.72 feet, thence North 05°12′40″ East 179.76 feet, thence North 01°43′20″ West 174.60 feet, thence North 15°16′40″ East 191.41 feet, thence North 02°18′00″ East 330.05 feet, thence North 04°58′00″ West 192.40 feet, thence North 01°47′20″ West 288.02 feet, thence North 04°47′20″ West 87.80 feet, thence North 08°13′20″ West 342.64 feet, thence North 03°07′20″ West 138.37 feet, thence North 13°31′00″ West 261.14 feet, thence North 09°45′00″ West 238.27 feet, thence North 03°13′40″ West 286.32 feet, thence North 06°05′20″ West 185.35 feet, thence North 01°57′20″ East 182.41 feet, thence North 02°01′40″ West 184.25 feet, thence North 20°13′20″ West 111.89 feet, thence North 02°11′40″ West 162.78 feet, thence North 22°04′20″ West 84.42 feet, thence North 33°36′20″ West 298.35 feet, thence North 45°06′00″ West 214.78 feet, thence North 06°46′00″ East 465.0 feet, thence North 01°32′00″ East 500.0 feet, thence North 01°03′00″ West 500.0 feet thence North 13°29′00″

West 500.0 feet, thence North 16°34'00" West 170.90 feet, thence North 89°47'30" East 847.40 feet to the North quarter corner of Section Twenty-four (24), Township Eighty-four (84) North, Range Forty-seven (47) West of the Fifth P.M., thence North 89°47'30" East 1331.22 feet to the Northwest corner of the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of said Section Twenty-four (24), thence South one quarter mile to the Southwest corner of said Northeast Quarter of the Northeast Quarter (NE¼Ne¼) of said Section Twenty-four (24), thence East one quarter mile to the East line of said Section Twenty-four (24), thence East one half mile along the South line of the North Half (N½) of the Northwest Quarter (NW¼) of Section Nineteen (19), Township Eighty-four (84) North, Range Forty-six (46) West of the Fifth P.M. to the longitudinal center line of said Section Nineteen (19), thence North along said longitudinal center line one quarter mile to the North line of said Section Nineteen (19), thence East along the North line of said Section Nineteen (19) one half mile to the point of beginning, and all accretions to the above described promises.

Defendants.

The plaintiff states:

1. That he is the purchaser under written contracts of the fee-simple title to the real estate described in the above caption, which is made a part of this petition by reference thereto.

2. That he purchased the above described promises by written contract from Joe Kirk and Bertha Kirk, husband and wife, which contract is dated January 2, 1940, said contract having been duly recorded in Book "s", Page "305" of Miscellaneous Records in the Office of the Recorder of Monona County, Iowa, on September 22, 1961, together with his brother, Henry K. Peterson, and that the interests of the said Henry K. Peterson were duly assigned to this plaintiff by the said Henry K. Peterson and his wife by a written assignment dated February 17, 1986, said assignment having been duly recorded in Book "s", Page "310" of Miscellaneous

Records in the Office of the Recorder of Monona County, Iowa, on September 27, 1961, and said contract and said assignment are made a part of this petition by reference thereto.

3. That the plaintiff, and his granters and vendors, have had the actual, open, notorious, continuous, exclusive, hostile and adverse possession of the above described real estate under claim of right and color of title for more than ten (10) years last past.

4. That the defendants, or some of them, as plaintiff is credibly informed and believes, make some claim to the said property, or some interest therein, adverse to the title of this plaintiff, but plaintiff alleges that any right, title or interest that the said defendants or any of them may ever have had in and to said real estate is junior and inferior to the title of this plaintiff and of his vendors.

5. That, as plaintiff is credibly informed and believes, the defendant State of Iowa makes, or may make, some claim to a portion of the above described real estate as an abandoned channel of the Missouri River or as lying below the high water line of the Missouri River, but plaintiff alleges that none of said described real estate lies below the existing high water line of the Missouri River or that any portion thereof lies within an abandoned channel of the Missouri River, and plaintiff alleges that the channel of the Missouri River, over a period of years, has gradually shifted toward the State of Nebraska and through the process of accretion the area formerly occupied by the channel has accreted to and is now a part of the land above described owned by this plaintiff as purchaser under the above described contracts.

6. Plaintiff alleges that any right, title or interest that the defendants, or any of them, may ever have had in or to said real estate, or any part thereof, is now barred by the Statute of Limitations.

7. Plaintiff alleges that the boundary of a considerable portion of the above described real estate is plainly

marked by partition fences, or otherwise, and that said boundary line has been recognized and acquiesced in by the interested portions and their grantors for a period of more than ten (10) consecutive years last past as the correct boundary line between the respective tracts.

8. Plaintiff is credibly informed and believes that various and numerous unknown persons claim to have some interest in said real estate or parts thereof, adverse to this plaintiff, and that said unknown persons are made parties defendant hereto under the designation of Unknown claimants. That plaintiff has used all available means to ascertain what claims are made and by whom, but that this plaintiff is unable to more definitely state the interest or interests the said unknown claimants claim to have otherwise than as set forth in this position, and plaintiff alleges that any right, title or interest that they or any of them may have ever had or may claim to have in said real estate would be as the surviving spouse, heirs, devisees, legatees, mortgagees, grantees, asignees, or representatives of the remote grantors of the plaintiff, or any of the defendants named in the caption of this petition, or as the successors in interest to some of the classes or persons herein mentioned.

9. Plaintiff alleges that the names and residences of the said Unknown Claimants, and each and all of them, are unknown to this plaintiff, and plaintiff has sought diligently to learn the same and has been unable to do so.

10. Plaintiff alleges that none of said defendants nor any of them and none of the said unknown claimants, have in fact, any right, title or interest in and to said real estate or any part thereof.

11. That the defendant, Monona County, Iowa, holds an apparent adverse interest or right in and to said premises by virtue of a tax deed given to Monona County, Iowa by the Treasurer of Monona County, Iowa, dated July 11, 1960, said deed being recorded in Book "K", page "436", in the tax deed records in the office of the

Recorder of Monona County, Iowa, but plaintiff alleges that said tax deed is void and of no effect for the following reasons:

a. That on March 22, 1946 Charles C. Ballard, the then record title holder of said premises, deeded the same to Joe A. Kirk by deed recorded March 23, 1946 in deed Record "69", Page "284", in the office of the Recorder of Monona County, Iowa and the said Joe A. Kirk is still the record title holder of said premises, although the said Raymond G. Peterson is now the contract purchaser thereof. That the transfer of title to said premises to the said Joe A. Kirk was duly entered in the transfer books in the office of the Auditor of Monona County, Iowa in Book "8" on Page "195".

b. That through some mistake or error on the part of some officials of Monona County, Iowa the ownership of said described premises was not noted upon the tax lists and "1" acre in the Northwest Ouarter of the Northeast Quarter (NW¼NE¼) and "2" acres in the Southeast Quarter of the Northeast Quarter (SE¼NE¼) were taxed in the name of Charles C. Ballard on December 2, 1957 the same were purported to be sold for delinquent taxes to Monona County, Iowa and said deed is recorded Book "K", page "436", tax deed records in the Office of the Recorder of Monona County, Iowa.

c. That said tax deed, and the proceedings leading up to the sale of said premises, is void for the reason that there is no proper description for the land purported to be described in said tax deed, the description given being "1 acre in part of the Northwest Quarter of the Northeast Quarter" and "2 acres in part of the Southeast Quarter of the Northeast Quarter" of said section 24, said description being too uncertain and not specifically describing which acre in the Northwest Quarter of the

Northeast Quarter and which 2 acres in the Southeast Quarter of the Northeast Quarter are meant.

d. That said tax deed is also erroneous and void for the reason that it states that personal service was obtained upon Charles C. Ballard when no such service was obtained, as shown by the records in the Office of the Treasurer of Monona County, Iowa.

e. That said tax deed is void for the reason that the same asserts that John Durr was in possession of said premises and this applicant alleges that the said John Durr was not in possession of said premises at the time the notice of the right of redemption was served upon him and at the time that said tax title was issued.

f. That said tax deed is void for the reason that it includes two purported parcels of real estate rather than one lot or parcel as provided by Section 448.1 of the Code of Iowa.

g. That said tax deed is void for the reason that it would be inequitable and improper for Monona County, Iowa to secure title to real estate becasue of the failure of the officials of Monona County, Iowa to properly list said real estate on the tax records and thus avoid the giving of notice to the owner of said premises.

12. That on August 24, 1964 a written demand was made upon the Board of Supervisors of Monona County, Iowa requesting that Monona County, Iowa give to this plaintiff a Quit Claim Deed to the Northwest Quarter of the Northeast Quarter (NW¼NE¼) and the Southeast Quarter of the Northeast Quarter (SE¼NE¼) of Section Twenty-four (24), Township Eighty-four (84) North, Range Forty-seven (47) West of the Fifth P.M. in Monona County, Iowa and plaintiff tendered to the said Board the sum of One Dollar Twenty-five Cents ($1.25) to cover the expense of the execution and

delivery of said deed, and said Monona County, Iowa has failed to deliver such a deed to this plaintiff, and plaintiff is entitled to the taxation of a reasonable attorney fee in favor of his attorneys as against said defendant, Monona County, Iowa, as provided by Section 649.5 of the Code of Iowa, in addition to the ordinary court costs.

13. That plaintiff asks no personal judgment against any of the defendants, except judgment against Monona County, Iowa, as set out in paragraph 12, above.

WHERFORE, plaintiff prays that his title and estate in and to the real estate described in the caption of this petition be established in plaintiff against the adverse claims of the defendants, and that each and all of them, and all persons claiming by, through or under them, or any of them, be forever heard and estopped from having or claiming to have any right, title or interest in and to said real estate adverse to this plaintiff, and that this plaintiff be coerced to be the absolute owner in fee-simple of the above described real estate and be entitled to the quiet and peaceful possession thereof, except only as to the rights of his vendors named in paragraph two of this petition, and that said title be forever guided in said plaintiff or against all claims of the defendants, and each and all of them, and for such other and furter relief as the court may deem equitable in the premises.

Plaintiff further prays judgement against Monona County, Iowa for a reasonable attorney fee to be taxed in favor of plaintiff's attorneys, as provided by Section 649.5 of the Iowa Code, for the reasons not forth in paragraph 12 and 13, above, and for a reasonable proportion of the court costs of this nation.

PRICHARD & PRICHARD
of Omaha, Iowa
ATTORNEYS FOR PLAINTIFF.

STATES OF IOWA
MONONA COUNTY } ss.:

I, R.D. Prichard, being first duly sworn, depose and say that I am one of the attorneys above named; that I am acquainted with the facts contained in the above and foregoing petition, and that said facts are true as I varily believe.

R. D. PRICHARD

Subscribed and sworn to before me this 12th day of October, 1934,

Notary Public in and for
Monona county, state of Iowa.

IN THE
DISTRICT COURT OF IOWA,
IN AND FOR MONONA COUNTY

RAYMOND G. PETERSON,

Plaintiff,

vs.

STATE OF IOWA, *et als,*

Defendant.

EQUITY NO. 17674

AMENDMENT TO PETITION

COMES NOW, Raymond G. Peterson, the above named defendant, and for amendment to his petition in the above entitled action, states to the Court:

1. He withdraws from the description of the land described in said petition the words "and all, accretions to the above described premises", and disclaims any right, title, claim or interest in or to any of the accretions to the land specifically described in said original petition.

WHEREFORE, plaintiff prays judgment as in his original petition except as to the accretions to the land specifically described therein.

/s/PRICHARD & PRICHARD
Prichard & Prichard
Onawa, Iowa
Attorneys for Plaintiff.

APPENDIX T

IN THE
DISTRICT COURT OF IOWA

IN AND FOR MONONA COUNTY

RAYMOND G. PETERSON,

Plaintiff,

vs.

STATE OF IOWA, *et al,*

Defendants.

EQUITY NO. 17674

ANSWER

COMES NOW the State of Iowa, defendant in the above captioned matter, and in answer to the Petition of the plaintiff, states:

1. That it denies the allegations contained in paragraph 1.

2. That it denies the allegations contained in paragraph 2.

3. That it denies the allegations contained in paragraph 3.

4. That the defendant State of Iowa denies that the right, title and interest of the defendant State of Iowa is junior and inferior to the title of the plaintiff and his vendors, and admits that the State of Iowa makes claim to said property.

5. That the defendant State of Iowa admits that it makes claim to a portion of the described real estate in paragraph 1 of plaintiff's Petition, but denies the remaining allegations contained in paragraph 5.

6. That the defendant State of Iowa denies the allegations contained in paragraph 6, and further states

that the statute of limitations do not run against the State of Iowa.

7. That the defendant State of Iowa denies the allegations contained in paragraph 7.

8. That the defendant State of Iowa denies the allegations contained in paragraph 8.

9. That for lack of information upon which to form a belief, the defendant State of Iowa denies the allegations contained in paragraph 9.

10. That the defendant State of Iowa denies the allegations contained in paragraph 10.

11. That the defendant State of Iowa denies the allegations contained in paragraph 11 and subparagraphs (a) through (g) thereunder.

12. That for lack of information upon which to form a belief, the defendant State of Iowa denies the allegations contained in paragraph 12.

13. That the defendant State of Iowa admits the allegations contained in paragraph 13.

WHEREFORE, defendant State of Iowa prays that the Petition of the plaintiff be dismissed at the cost of the plaintiff.

STATE OF IOWA, *Defendant*
By: EVAN HULTMAN
Attorney General

WILLIAM J. YOST
Assistant Attorney General

STATE OF IOWA
COUNTY OF POLK } ss.:

I, William J. Yost, being first duly sworn on each depose and say that I am the attorney for the defendant State of Iowa in the above and foregoing Answer, and that

[Copy Missing]

IN THE

DISTRICT COURT OF IOWA

IN AND FOR MONONA COUNTY

RAYMOND G. PETERSON,

Plaintiff,

vs.

STATE OF IOWA, *et, al.*,

Defendants.

EQUITY NO. 17674

DISCLAIMER

COMES NOW the Defendant State of Iowa and disclaims any right, title, interest or claim in or to the real estate described in plaintiff's Petition filed herein on October 12, 1964, as said described real estate description was amended by plaintiff's Amendment to Petition filed herein on December 14, 1964.

The Defendant State of Iowa hereby withdraws its Answer filed herein on December 2, 1934, and states that it does not elect to plead further in this case or to make any other or further defense to plaintiff's Petition as amended, or to plaintiff's cause of action.

WHEREFORE the defendant State of Iowa only prays that no judgment for costs be rendered against it herein.

[Copy illegible]

APPENDIX U

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN R. WILSON, *et al.*,
Defendants.

C 75-4024

OMAHA INDIAN TRIBE,
Plaintiff,

v.

HAROLD JACKSON, *et al.*,
Defendants.

C 75-4026

OMAHA INDIAN TRIBE,
Plaintiff,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

C 75-4067

MOTION OF OMAHA INDIAN TRIBE TO HAVE DISQUALIFIED AND TO ENJOIN EVAN L. HULTMAN, UNITED STATES ATTORNEY, JAMES J. CLEAR, AND SUCCESSORS FROM FURTHER PARTICIPATION IN THESE CASES AND MEMORANDUM IN SUPPORT

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
[202] 466-3890

Attorney for Omaha Indian Tribe

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN R. WILSON, *et al.*,
Defendants.

C 75-4024

OMAHA INDIAN TRIBE,
Plaintiff,

v.

HAROLD JACKSON, *et al.*,
Defendants.

C 75-4026

OMAHA INDIAN TRIBE,
Plaintiff,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

C 75-4067

MOTION OF OMAHA INDIAN TRIBE TO HAVE DISQUALIFIED AND TO ENJOIN EVAN L. HULTMAN, UNITED STATES ATTORNEY, JAMES J. CLEAR, AND SUCCESSORS FROM FURTHER PARTICIPATION IN THESE CASES AND MEMORANDUM IN SUPPORT

I.

COMMITMENT TO COMPLIANCE

Plaintiff Omaha Indian Tribe, and its Counsel, in total good faith, commit themselves fully to comply with the spirit and intendment of this Court's Orders and explicitly inform this court that this filing is not for the purpose of delay but

to preserve and to protect Plaintiff Tribe's Constitutional, civil, and property rights against violation, all as hereafter fully alleged.

II.

INTRODUCTION

Plaintiff Omaha Indian Tribe, an alleged beneficiary in the case of *United States v. Charles E. Lakin, et ux., . . . R.G.P., Inc. . . . State of Iowa . . . Roy Tibbals Wilson* [John R. Wilson], *et al.*, Civ. No. 75-4024, has been effectively denied its day in this Court regarding title to 11,300 acres of land, including but not limited to the Blackbird Bend Area, title to which resides in Plaintiff Omaha Indian Tribe. Plaintiff Tribe is cognizant of the forces that have coalesced against it to prevent Plaintiff Tribe from being fully heard in this Court respecting its claims and specifically charges arbitrary, capricious, illegal and totally unprofessional conduct against Evan L. Hultman, United States Attorney, Department of Justice, Cedar Rapids, Iowa, and James J. Clear, Attorney, Department of Justice, and

RESPECTFULLY MOVES THIS COURT to disqualify Evan L. Hultman and James J. Clear and their successors in this litigation and to enjoin them and their successors from further participation in these cases upon the following grounds and for the following reasons:

III

PREFACE TO HULTMAN'S FRAUDULENT COMPLAINT

Plaintiff Tribe's Title to 6390 Acres in Blackbird Bend

For years the Omaha Indian Tribe was fully aware that title to a large area of land, including but not limited to the Blackbird Bend Area, now situated in Monona County, State of Iowa, resided in Plaintiff Tribe. An obdurate, frequently incompetent, bureaucracy refused to take cognizance of the

undeniable fact that several thousand acres of land in the State of Iowa should be recovered by the United States of America, Trustee for Plaintiff Omaha Indian Tribe. In 1973 there were assembled by Plaintiff Omaha Indian Tribe and those acting under its direction facts which established *prima facie* Plaintiff Tribe's title to those lands in Iowa.

IV.

In the years 1973-1974 an in-depth review of the facts and the law established the validity of Plaintiff Tribe's claims, resulting in a specific request by Plaintiff Tribe to the Bureau of Indian Affairs and the Solicitor's Office of the Department of the Interior, to direct the Department of Justice to initiate a quiet title action on behalf of Plaintiff Tribe against the non-Indian squatters, including the State of Iowa, who were occupying Plaintiff Tribe's lands. As established by the facts hereafter pleaded, the Department of Justice, in total bad faith, seized upon that request as a means of defeating Plaintiff Tribe's title to thousands of acres of land, giving rise to this Motion.

V.

A most critical fact, respecting Plaintiff Tribe's title, is the admission by the non-Indian squatters, including the Defendant State of Iowa, that they can not deraign their title to patents from the United States. An anomaly is the claim of Defendant State of Iowa. Sole basis of its claim to Blackbird Bend lands are quit claim deeds containing grossly inaccurate descriptions from Defendant Lakin and the predecessor of R.G.P. Inc. Thus Iowa's title is derained from Tribe, representatives from the Nebraska Congressional delegation, and Bureau of Indian Affairs representatives, was couched in the caveat that Mr. Sampsel fully understood Plaintiff Tribe's problem and would seek to assist in obtaining money from other sources with which to pay Plaintiff Tribe which funding was short lived. As a consequence for approximately three

years Plaintiff Tribe has been totally without funds to conduct this costly litigation.

LXXXIV.

With singular effect respecting the "deal cut," incumbent Secretary Donald P. Hodel, acting by and through the Solicitors Office, seeks financially to strangle Plaintiff Tribe. That course of conduct comports fully with Hultman's strangulation of Plaintiff Tribe's land claim by seeking to convert the nonexistent 1867 Meander Line into a boundary. Those are factors contributing to the taint that pervades all aspects of this litigation. On the background of intentional, fraudulent misconduct by Messrs. Hultman, Clear, and other personnel in the Department of the Interior and the Department of Justice, Plaintiff Omaha Indian Tribe, having invoked this Court's jurisdiction, pursuant to 28 U.S.C. 1362,
RESPECTFULLY PRAYS THIS COURT:

1. To adjudge, declare, and determine that the Complaint filed on May 19, 1975, by Evan L. Hultman, United States Attorney in the case of *United States v. Wilson,...State of Iowa, State of Iowa Conservation Commission, et al.*, Civ. No. 75-4024, is null and void and of no force and effect and is stricken from the record by reason of the fact that the Complaint was fraudulently drafted with the objective of constricting and limiting Plantiff Tribe's claims in the Blackbird Bend Area to conform with commitments made by Evan L. Hultman to other defendants while Attroeny General for Iowa, acting for and on behalf of Defendant Iowa and Defendant State of Iowa Conservation Commission;

2. To adjudge, declare, and determine that this Court, when it entered its *sua sponte* April 5, 1976 Order, was wholly without knowledge of the fraud practiced upon Plaintiff Tribe by Evan L. Hultman and other personnel in the Department of Justice, when they formulated and filed the May 19, 1975 Complaint, in Civ. No. 75-4024, with the objective of effectuating commit-

ments made by Evan L. Hultman, as Attorney General for the State of Iowa, all as alleged above, to the Defendants named in his Complaints;

3. To adjudge, declare, and determine that, by reason of the fraud practiced upon this Court and Plaintiff Tribe by Evan L. Hultman, there is stricken from the April 5, 1976 Order the following provision that:

> "...trail of all issues relating to lands in No. C 75-4067 which are not also within the subject res of Nos. C 75-4024 and C 75-4026, and all issues of damages, will be severed. Cases Nos. C 75-4024 and C 75-4026 will remain consolidated with each other and with the portion of No. C 75-4067 relating to the identical subject res.

4. To adjudge, declare, and determine that the Complaint filed on October 6, 1975, in the case of *Omaha Indian Tribe v. Agricultural & Investment Corp. . . Charles E. Lakin, et al., R.G.P., Inc., State of Iowa, State of Iowa Conservation Commission . . . Harold Sorenson, et al . . . Wilson* [now John R. Wilson], . . . *et al.*, C 75-4067 has as its subject *res* in Tract I, Blackbird Bend Area, title to the full 6390 acres involving land both inside and outside the 1867 Barrett Meander Line as that claim pertains to each of the last-named defendants who claim adversely to Plaintiff Tribe to the Blackbird Bend lands;

5. To adjudge, declare, and determine that the phase of Plaintiff Tribe's Complaint in C No. 75-4067, designated Tract I, Blackbird Bend Area, would proceed forthwith to final judgment predicated upon the present record in regard to Defendants Charles E. Lakin and Florence Lakin; R.G.P., Inc., Harold Sorenson, *et al.*, State of Iowa; State of Iowa Conservation Commission; and Roy Tibbals Wilson [John R. Wilson], excepting totally from that final judgment those Defendants within the Blackbird Bend Area whose rights and interests have not been heard by this Court;

6. To enter an order disqualifying and enjoining from further participation in the Blackbird Bend and

related cases Evan L. Hultman, United States Attorney, Department of Justice, James J. Clear, Attorney, Department of Justice, and their successors;

7. To order Evan L. Hultman, United States Attorney, fully to respond to the charges herein made by Plaintiff Omaha Indian Tribe of Hultman's fraudulent misconduct and to appear in this Court to face the charges made against him in these proceedings by Plaintiff Tribe;

8. To order James J. Clear, Attorney, Department of Justice, to respond to the charges herein made by Plaintiff Omaha Indian Tribe of Clear's fraudulent misconduct and to appear in this Court to face the charges made against him in these proceedings by Plaintiff Tribe;

9. To require Myles Flint, Deputy Assistant Attorney General, Land and Natural Resource Division, Department of Justice, to appear before this Court and to explain the background and history of the Hultman Complaint, including but not limited to the adamant refusal of Mr. Flint and others to take cognizance of the fact, concerning which they had full information, that the constricted and truncated Complaint abandoned large areas of land in the Blackbird Bend Area title to which is claimed by Plaintiff Omaha Indian Tribe; and

10. To order Evan L. Hultman and James J. Clear to pay to Plaintiff Omaha Indian Tribe all of the costs that have been incurred including reasonable attorneys fees, in defending itself throughout this protracted matter, and for such additional and further relief as may be proper under the circumstances.

Respectfully submitted,

WILLIAM H. VEEDER

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(202) 466-3890

Attorney for
Omaha Indian Tribe

Dated November 6, 1985

APPENDIX V

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

C 75-4024

JOHN R. WILSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE, *etc.*,
Plaintiff,

vs.

C 75-4026

HAROLD JACKSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE,
Plaintiff,

vs.

C 75-4067

AGRICULTURAL INDUSTRIAL
INVESTMENT CO., *et al.*,
Defendendants.

UNITED STATES' OPPOSITION TO OMAHA TRIBE'S MOTION TO DISQUALIFY AND UNITED STATES' REQUEST FOR SANCTIONS

In a motion dated November 6, 1985, the Omaha Tribe, plaintiff in Nos. C 75-4026 and C 75-4067, moved for an order.

1. declaring that the complaint filed by the United States is null and void and striking the complaint from the

[copy missing]

2. striking the consolidation order of April 5, 1976;

3. declaring that the Tribe's complaint filed in C 75-4067, concerns 6,390 acres of land;

4. declaring that the complaint in C 75-4067 "would proceed forthwith to final judgment;"

5. disqualifying "from further participation in the Blackbird Bend and related cases" the United States Attorney, James J. Clear, and their successors;

6. ordering the United States Attorney to appear in court and face charges made against him by the Omaha Tribe;

7. ordering James J. Clear to appear in court and face charges made against him by the Omaha Tribe;

8. ordering the Deputy Assistant Attorney General to appear in court "to explain the background of the Hultman Complaint;"

9. ordering the United States Attorney and James J. Clear to pay the Omaha Tribe's costs and attorneys fees.

The United States strongly opposes the motion and rejects the allegations of impropriety by government attorneys contained therein. The United States further requests that sanctions be imposed on Mr. Veeder pursuant to Rule 11, F.R.Civ.P., because he is fully aware that the motion is not well grounded in fact or law and because it was filed for an improper purpose—to harass government counsel, to retaliate for the filing of the United States' motion to show

cause: re civil contempt, and to further delay Docket C 75-4024.

I.

On September 26, 1985, the Omaha Tribal Council passed Resolution No. 85-79 instructing its counsel to file the November 6, 1985, motion. Attachment A. It is clear from the text that the council passed the resolution because the council was upset over the show cause order issued by this Court. The Tribe's resolution was mailed to officials of the Department of the Interior, which is charged to complete the survey repeatedly ordered by this Court, that same day. The motion itself was filed on November 6, 1985, immediately after the crew from the Cadastral Survey began its field work.

The allegations of misconduct concern events that took place ten and twenty years ago. While these allegations are false, and are known to be false by the Omaha Tribe and Mr. Veeder, the renewal of the allegations by the Tribe in its September resolution and the filing of the motion in November show that the Tribe and its counsel acted solely to harass the government's lawyers and to intimidate the Department of the Interior in the hopes of preventing the completion of the survey field work. Rule 11, F.R.Civ.P., provides that the signature of a party or an attorney to a motion constitutes a certification that it is not interposed for any improper purpose. This rule was violated by the November 6, 1985, motion.

II.

Rule 11 also provides that the signature of an attorney on a motion constitutes a certification by him "that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact."

The motion's allegations of misconduct are not well grounded in fact and Mr. Veeder is fully aware that they are not well grounded in fact. The gist of the motion is that the

complaint filed by the United States in Docket C 75-4024 was drafted by the United States Attorney, Mr. Hultman, in a fraudulent manner, in order to fulfill some alleged illegal commitment made by him more than ten years earlier, when he was Attorney General of Iowa.

Mr. Veeder's allegations fail, however, because Mr. Hultman did not draft the complaint, the motion for preliminary injunction, on the memorandum in support in Docket C 75-4024. The complaint was drafted by the Department of Justice in Washington D.C. and mailed to Mr. Hultman on May 17, 1975, by letter advising him not to file the papers unless specifically instructed to do so by Washington. A copy of the letter is attached as Attachment B. When Mr. Hultman was so instructed, the complaint was filed by Mr. Sikma, the Assistant United States Attorney in Sioux City, Iowa. All major government pleadings in this case were prepared in Washington, including those signed by the Assistant United States Attorney in Sioux City. Pretrial, trial, and appeals were all handled by government counsel from Washington as the Tribe, Mr. Veeder, and the Court know.

The circumstances surrounding the filing of the government's complaint are fully set out in the attached letters to Congressman Yates from Attorney General Levi and Assistant Attorney General Taft. Attachments C and D. These letters were written in response to the same allegations made on December 28, 1976, by Mr. Veeder. While Mr. Veeder's charges at that time were not directed at Mr. Hultman, the responsive letters clearly state the history of the initiation of Docket C 75-4024. Mr. Veeder had been furnished copies of these letters and thus was fully aware of their contents prior to filing his November 6, 1985, motion.

As the letters to Congressman Yates also show, Mr. Veeder, at the time of the filing of the complaint in Docket C 75-4024, was an employee in the Washington office of the Bureau of Indian Affairs and was specifically charged with preparing the litigation report referring the case from the Interior Department to the Justice Department. He was intimately familiar with the events in 1975 and was aware

that the case was referred by the Interior Department to the Assistant Attorney General for the Land and Natural Resources Division of the Justice Department, and not to Mr. Hultman.

As Attorney General Levi's January 18, 1977, letter points out, "(t)he federal action was originally recommended both as to legal theory and scope of acreage based on a memorandum dated September 12, 1974, by the same Mr. Veeder." As that same letter points out, initial investigations by experts employed by the Justice Department after suit was filed indicated that the Tribe could have a claim to a much larger area and the Justice Department wrote to Interior seeking its recommendation whether the scope of the suit should be expanded and whether Mr. Sorenson (whose name had not been supplied to the Justice Department in the Interior Department's initial litigation report).* By memorandum dated November 19, 1985, Mr. Veeder advised his superior that, after lengthy conversations with counsel for the Omaha Tribe, Donald O'Brien (now Chief Judge O'Brien) it was Mr. Veeder's recommendation that the federal complaint not be amended. On December 2, 1975, the Interior Department advised the Assistant Attorney General for the Land and Natural Resources Division not to amend the complaint, and Mr. Veeder's name appears on this letter.

Mr. Veeder's allegations of impropriety were unfounded in 1977 and they are unfounded now. His November 6, 1985, motion raises no new charges not heretofore considered by the Court except that now it is Mr. Hultman rather than the Assistant Attorney General for the Land and Natural Resources Division, who is the alleged to be the culprit. However, Mr. Hultman's only direct participation in this case alleged in the motion was his attendance at a meeting in June, 1984, nine years after the filing of the complaint. As the letters to Congressman Yates point out, all of the other meetings that took place between Tribal Councilmen, and tribal attorneys on the one hand, and government attorneys

* In fact, the United States Attorney's office in Sioux City, Iowa, was the first to inform the Department of Justice that Mr. Sorenson claimed title to land within the Barrett Survey line.

handling the case for the United States on the other, were attended by attorneys from the Land and Natural Resources Division on behalf of the United States and not by Mr. Hultman.

The allegations of misconduct by Mr. Hultman while Attorney General of Iowa are very difficult to follow. It is clear, however, that the only way they can make sense is if Iowa's disclaimer of title in the *Lakin* and *Peterson* cases is linked to the government's complaint in C 75-4024 and if Mr. Hultman had been the prime mover in drafting and filing the complaint in C 75-4024. As we have shown, however, Mr. Hultman did not draft the complaint in C 75-4024.

We also fail to see how Iowa's disclaimer of title in *Lakin* and *Peterson* adversely affected the Tribe's claims. The documents attached to Mr. Veeder's motion show that Iowa unambiguously stated that it did not claim title to any of the land in dispute in those cases. Iowa's position is therefore not inconsistent with the Tribe's position that Iowa had no title.

Mr. Veeder's allegations therefore have no basis in fact and he knows they have no basis in fact. The motion therefore violates rule 11.

III

Mr. Veeder's allegation that the Justice Department has thwarted his efforts to prosecute Docket C 75-4067 are equally unfounded. The only case of the three that has progressed is Docket C 75-4024. Insofar as we are able to ascertain, nothing has occurred in C 75-4067, except because of its consolidation with C 75-4024, since the filing of the complaint and responsive pleadings. Although Mr. Veeder's motion says that he and the Tribe had "completed intensive investigations respecting the hydrology, geology, history and all pertinent matters essential to sustain its claim to lands in question" prior to filing the complaint in C 75-4067 (Tribe's motion, pp. 24-25), nothing has happened in the ten years since the complaint was filed.

It is incumbent on the plaintiff to prosecute its case. The government has done nothing to hinder the prosecution of C 75-4067. Indeed the Bureau of Indian Affairs has provided the Tribe with over $800,000 for attorney's fee and studies, and yet there has been no discernible movement in the C 75-4026 and 4067.

Comparing the efforts of the Justice Department in C 75-4024 with Mr. Veeder's efforts in C 75-4067, it is apparent that the allegations of misfeasance on the part of the Justice Department are unfounded. The Justice Department has prosecuted C 75-4024 through the trial and to the Supreme Court with the result that the Tribe's title to a substantial portion of the Barrett Survey lands will soon be quieted. In C 75-4067 nothing has happened at all since 1975 other than payments being made to the Tribe by B.I.A. to cover its costs and expenses in that case.

IV

The Tribe's motion to disqualify has no legal basis. By statute the Attorney General or his designee represents the United States in all cases before the courts. There is no allegation that United States' counsel in this case were not validly designated by the Attorney General to represent the United States.

The Tribe's request that the United States Attorney, the Deputy Assistant Attorney General, and James J. Clear be required to appear before the Court and explain to the Tribe the circumstances surrounding the filing of the complaint in C 75-4024 is unfounded in fact or in law. Those circumstances are well known to the Omaha Tribe and to Mr. Veeder and are fully set out in the attached letters to Congressman Yates. The motion is designed entirely to harass government counsel and violates Rule 11.

VI

The Tribe's motion for costs and attorney's fees is not well grounded in fact or in law. The Tribe has received huge amounts of money from the B.I.A. over the years to cover its cost of litigation and thus has suffered no financial harm from this litigation.

No cases are cited by the Omaha Tribe to justify its request for attorneys fees. There is therefore no foundation in law or in fact for the motion.

The Justice Department has not interfered with the Omaha Tribe's right to counsel of its own choice. As the attached letters show, the Tribe's right to counsel has been well respected. The Tribe's own motion states that its attorney contracts have been consistently approved by the Secretary of the Interior. The Department of Justice is not consulted by the Secretary when he reviews attorney contracts, and if we were asked for our views we would probably decline to comment.

CONCLUSION

The motion for the Tribe is not well grounded in fact or warranted by law. Mr. Veeder is fully aware that his allegations of Justice Department misconduct are unwarranted and the Court is well aware that his allegations of misconduct on the part of Judge Bogue and the Court of Appeals are misguided. The motion violates Rule 11 and sanctions should be imposed.

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for EVAN L. HULTMAN
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APPENDIX W

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v. *C 75-4024*

JOHN R. WILSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE,
Plaintiff,

v. *C 75-4026*

HAROLD JACKSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE,
Plaintiff,

v. *C 75-4027*

AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., *et al.*,
Defendants.

REPLY
OF PLAINTIFF OMAHA INDIAN TRIBE
TO OPPOSITION OF
HULTMAN, FLINT, AND CLEAR
AND
MOTION TO STRIKE THAT OPPOSITION

Plaintiff Omaha Indian Tribe replies to the Opposition filed by Defendant James J. Clear, on his own behalf, on behalf of Defendants Evan L. Hultman and Myles E. Flint to Plaintiff Tribe's January 9, 1986 Motion for Summary Judgement, and respectfully emphasizes to this Court that Defendants Hultman, Flint, and Clear have failed totally to respond to Plaintiff Tribe's Motion for Summary Judgement and to the Affidavit of Plaintiff Tribe's Counsel and to the Affidavit of Elmer M. Clark, limiting their opposition to an invidious, scurrilous, and grossly inaccurate attack upon Plaintiff Tribe's Counsel, leaving uncontroverted and unanswered the critical charges made under oath concerning which Rule 56 (e) mandates that responses to those sworn charges must be by "affidavit" or they are admitted, all as reviewed in the Memorandum in Support. Predicated upon Rule 56 (e) and the authorities cited, Plaintiff Tribe

RESPECTFULLY PRAYS THIS COURT TO GRANT ITS MOTION FOR SUMMARY JUDGEMENT AND TO DECLARE, ADJUDGE, AND DECREE that:

I

The "Complaint to Quiet Title and for Injunctive Relief," filed May 19, 1975, was fraudulently formulated, fraudulently prepared, and fraudulently filed by Defendants Evan L. Hultman, United States Attorney, Department of Justice, and Myles E. Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and is null and void and of no force and effect, vacated. and set aside.

II

Plaintiff Omaha Indian Tribe, by its Complaint filed October 6, 1975, in the case of *Omaha Indian Tribe v. Agricultural & Industrial Investment Co., . . . Charles E. Lakin and Florence Lakin . . . Harold Jackson . . . Otis*

Peterson . . . R.G.P., Inc. . . . Harold M. Sorenson, et al., . . . State of Iowa, State of Iowa Conservation Commission . . . John R. Wilson . . . , et al., C No. 75-4067, claimed title to the full 6390 acres of land in the Blackbird Bend Area against the last-named Defendants, including but not limited to all of the lands described in the May 19, 1975 Complaint filed by Evan L. Hultman.

III

Each of the last-named Defendants answered Plaintiff Tribe's October 6, 1975 Complaint, asserting and declaring in error, among other things, that the Blackbird Bend Area—not limited to the land within the 1867 Barrett Meander Line—was totally eroded away and replaced by accretions to the left or Iowa bank of the Missouri River. None of the Defendants claimed land other than as part of the 6390 acres in the Blackbird Bend Area. Moreover, all of the evidence offered in the trial on the merits by all of the parties, including the Department of Justice, pertained to the 6390 acres and not to the lands described in the May 19, 1975 fraudulent Complaint. This Court will decide the issues presented and will enter final judgment upon the record as it pertains to the 6390 acres.

IV

PLAINTIFF OMAHA INDIAN TRIBE PRAYS, moreover, that this COURT DECLARE, ADJUDGE, AND DECREE that: Evan L. Hultman, United States Attorney, Myles E. Flint, Deputy Assistant Attorney General, Land and Natural Resources Division, and James J. Clear, Attorney, Department of Justice be and they are hereby disqualified, prohibited, and enjoined from further participation in these cases.

V

Specific Response By Plaintiff Tribe To Opposition

Plaintiff Omaha Indian Tribe, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure respectfully moves this Court to

[Missing Copy]

to allege to this Court that counsel for Plaintiff Tribe "... claims to have had substantial responsibility for the preparation of the Interior Department's litigation report" calls for explicit condemnation by this Court for a studied falsehood presented by Hultman, Flint and Clear to this Court in regard to a critical issue of professional integrity. It is explicitly denied by counsel for Plaintiff Tribe that he participated in any way in (a) the preparation of the Interior Department's litigation report—which to date counsel has never seen and which was intentionally withheld from him—or (b) in the preparation of the fraudulent complaint filed by Hultman and Flint. As explicitly declared in counsel's "Verified Statement," immediately upon seeing the Complaint constricting Plaintiff Tribe's claim to the 1867 Barrett Meander Line, counsel charged Defendant Myles E. Flint with splitting Plaintiff Tribe's claim against the Defendants, giving rise to this present controversy.[14]

XIII

Attorneys for "Squatter Defendants" Acted in Concert with Interior and Justice Department Attorneys

Counsel for Plaintiff Tribe in his "Verified Statement" refers to the fact that Mr. Charles P. Corke, P.E., General Engineer and Hydrologist, Bureau of Indian Affairs, has personal knowledge respecting the preparation, background, and political incursions by counsel for the Defendants in forcing the initiation without preparation by Flint and Hultman of the case of *United States v. Wilson,* No. C 75-4024.[15] Counsel further declares in the Verified Flint, and Clear; and

[14] Verified Statement, p.11, para. 15.
[15] Ibid., p. 15, lns. 4-26.

2. To deny sanctions prayed for in that Opposition.

Respectfully submitted,

WILLIAM H. VEEDER

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Attorney for
Omaha Indian Tribe

February 7, 1986

APPENDIX A

[Paste-up letterhead]

Trust Responsibilities

Memorandum

To:	Deputy Assistant Secretary—Indian Affairs (Operations)
Through:	Director, Office of Trust Responsibilities
From:	General Engineer (Hydrology)—Designated BIA Representative for Omaha Boundary Determination
Subject:	Omaha Indian Reservation Boundary Determinations

Pursuant to the meeting chaired by you and held in the Assistant Secretary's Conference Room on June 4, there is attached a chronological listing of communications and events pertaining to the efforts of the Omaha Tribe for a determination of the rightful eastern boundary of the Omaha Indian Reservation in the State of Iowa. The sequential listing (although lengthier than anticipated) does not include superfluous side issues and unrelated docket card items. Attending the June 4 meeting were Deputy Assistant Attorney General Spears and staff; United States Attorney Hultman; Associate Solicitor Baird; the entire Omaha Tribal Council with Counsel Veeder and Consultants Clark, Cline and Watson; Director Mills and staff; Area Director Jaeger; Superintendent Christie; Field Solicitor Shulstad; and Mr. Scarborough from Senator Exon's Office.

The Bureau of Indian Affairs deserves generally high marks for its performance in this ongoing conflict between

the Omaha Indian Tribe and non-Indian squatters who have occupied lands of the Tribe. As you follow the evolution of this issue you will recognize that the major problems arose as the Interior and Justice lawyers vetoed the requests and recommendations of BIA leadership. Exercise of that veto power is foremost exemplified by the faulty complaint filed by Department of Justice—a complaint filed without prior consultation with the Tribe or BIA. Tragic consequences continue by reason of that complaint. The Sorenson trespass debacle had its inception in the fact that Justice overlooked the joinder of Sorenson. The present survey impasse between the Tribe, Solicitor's Office, Bureau of Land Management and Department of Justice stems from the fact that the complaint excluded the former fee patented lands, which lands are accretions to tribal land.

The Omaha Boundary Determination project was assigned to me in 1973 at the request of the Omaha Tribe. As the Bureau's designated representative assigned to assist the Omaha Tribe, I have been involved in every phase and aspect of the procedings since that time including the technical direction of the tribe's experts and testifying as an expert witness for the tribe during trial. As a consequence of my close involvement, I felt compelled to commit to you the preparation of the chronology of the Omaha boundary determination efforts when, during the June 4 meeting, a single memorandum of 1975 vintage was taken out of context and its content and significance were repeatedly misrepresented to mislead and confuse the Omaha Tribe and most others present who were not fully familiar with the entire background. In my opinion, it was done in an attempt to justify the total breakdown in representation of the Tribe.

Portrayed throughout the chronology is a litany of actions taken by Interior's Solicitor and the Department of Justice (DOJ) in total and deliberate disregard of the interests and desires of the Omaha Tribe of Nebraska and counter to the recommendations of the Commissioner of Indian Affairs. The sequence of occurrences can be summarized by phases as follows:

First,—the investigation stage—The Omaha Tribe had for years urged the Trustee to take action to return to the Omahas, lands and accretions to those lands in Iowa. Finally in 1973, faced with demonstrations and visions of violence plus urgings by the Nebraska Congressional delegation, the Bureau of Indian Affairs commenced funding of investigations to determine the full scope and extent of supportable claims. (It is interesting to note that initially it was Senators Curtis and Hruska with Congressman Thone and now it is Senators Exon and Zorinsky with Congressman Bereuter—all of them have staunchly supported funding to the Omaha Tribe so that the *tribe* could conduct studies and then could have *its day in court.*)

Second,—the pre-trial stage—The Department of Justice, following the Solicitor's request and without sound, factual support, filed a constricted quiet title proceeding against the urgings of both the Commissioner of Indian Affairs and the tribe. The tribe continued their investigations of geology, hydrology and river morphology. When satisfied as to the outside limits of their supportable claim, the tribe then instituted court action covering title to all of their claim within Iowa, aggregating some 11,300 acres.

Third,—the trial and appeal stage—When the trial of the 2,900 acres within the Barrett Survey Line unfolded, all parties agreed with the tribe's proof that land out to the Easterly and Northerly high banks demarking Blackbird Bend, were accretions to the 1867 Missouri River. The DOJ joined the tribe in proof that the river left the "*banks*" by avulsions thus creating the base property of the Omahas on the east side of the present Missouri River and state boundary. The tribe avers that the so-called fee patent lands, excepted from the complaint filed by DOJ, were obliterated and abandoned and the replacement lands accreted to the tribe's base property.

Appeals and remands have lengthened this phase which has still another appeal process to go.

Fourth, and last, covers the recent Sorenson trespass and survey matters. The anomalous mishandling by DOJ of

the trespass by tribal defendant Sorenson (omitted as a defendant in the DOJ case) upon lands quieted in the tribe can be likened to making a cancer out of a pimple. And then the trespass settlement was made behind the tribe's back.

In regard to the survey issue, unilateral action was taken by DOJ to cause the Court to change a final order that was being appealed by the tribe to one intended to force the tribe to allow survey of internal lands that were the subject of appeal. It was a vindictive, anti-tribe act in an apparent further attempt to justify their original conduct in excluding those lands from the complaint filed. Common sense dictates that title matters should be finally settled prior to making property surveys—unless settlement commitments have been made.

The Omaha Tribe of Nebraska has maintained a consistent, unified position throughout the period of the chronology extending over four tribal administrations. They vow to continue the fight for their rights and their right to be heard. The tribe sought to have DOJ with them but instead found that DOJ persisted in undercutting tribal interests at every opportunity, so they were first invited out and then petitioned to get out. Even if DOJ were able now to become a party in the tribe's total case (C75-4067), they have never, to this date, functioned as an unequivocating advocate for the Omaha interests. There is grave doubt that their performance would change. The unwanted representation by DOJ has hampered and delayed every step. Examination of the record will disclose that not a single motion has been sought by DOJ for an Order by the Court to benefit the cause of the Omahas. The Omaha Tribe has spelled it all out once again in Resolution No. 84-64 of May 31, 1984 presented to you at the June 4 meeting (copy attached).

In this case history, the final chapters remain to be written. As Judge Bogue from the bench asked of Mr. Clear, DOJ attorney, during the 1976 trial, " . . . Let's get right on the record, why are you here?" and among other remarks, observed "If you are talking about independence and you are

talking about letting the tribe have some say so at long last in their destiny, how can you turn around and take it away from them. . . this is not a very fine day for the Department of the Interior. . .".

History of this issue discloses that the Omaha Tribe has been treated shabbily. Throughout this tortuous decade actions have not been taken according to either facts or tribal wishes. Certainly, the Omahas are entitled to support and unswerving advocacy. As an administrator with a legal background, you can appreciate the Tribe's position.

Further information and copies of the source documentation will be provided, if desired.

CHARLES P. CORLEY

Attachments:

1. Chronology
2. Tribal Resolution No. 84-64

CHRONOLOGY OF OMAHA BOUNDARY DETERMINATIONS

Date	
5/9/66	Petition of Iowa landowners (later defendants in the Tribe's case) supporting tribal claim for lands within 1867 survey (Barrett Line). First signature was tribe's defendant Harold Sorenson.
6/2/66	Seven page letter from Area Director, Aberdeen to Commissioner giving history of Omaha lands and land conflicts and transmitting Omaha Tribal Resolution No. 66-7 of 8/27/65 requesting the United States to institute action on behalf of Omahas "since the river is now stabilized".
7/5/72	Memorandum from Aberdeen Area Director to Commissioner transmitting and supporting Omaha tribal Resolution No. 72-34 of 6/26/72 again requesting federal assistance including funding with legal work to be done under direction and supervision of W. H. Veeder.
4/5/73	Peaceful demonstration on Blackbird Bend by 20-50 individual Omahas without Tribal Council sanction (Post Wounded Knee) protesting non-Indian use and occupancy. Both U.S. Attorneys (Omaha, Nebraska and Sioux City, Iowa) were worried and watchful for violence but pleased with TV coverage.
4/19/73	Memorandum from Area Director to Assistant Secretary—Indian Affairs transmitting Omaha Tribal Resolution No. 73-34 requesting assistance in resolving boundary claims ($ and direction).
5/8/73	Trial in State Court proceeding in Onawa, Iowa on application by squatter's tenants for right of possession and removal of Omaha Indian demonstrators.
5/16/73	State Court Judge granted the application and issued a writ of removal against Mr. Cline, the leader of the demonstrating group.
6/22/73	Letter to Tribal Chairmen from Assistant to the Secretary Franklin assigning Corke and Veeder to be in charge of technical and legal matters for the Omaha-Winnebago Boundary Determinations.

6/25/73 *Aberdeen Area Office contract with E. M. Clark and Associates for Omaha-Winnebago Boundary* Determination research and investigations.

6/26/73 Aberdeen Area Office Title Abstract contract to Monona County Abstract and Title Company.

6/29/73 Letter to Congressman Thone from Assistant to the Secretary notifying of the designation of Corke as BIA representative for the boundary determinations as requested by the tribes.

9/12/74 Submission to Solicitor of "Memorandum of Points and Authorities in support of Title of Omaha Indian Nation to Blackbird Bend Area *within Secretarial Boundary and Related Matters* by William H. Veeder." Recommendations were:

1. The Secretary—under his broad boundary setting powers—*to proclaim immediately that* the land area within the 1867 Barrett Meander Line Survey is and always has been part of the Omaha Indian Reservation. Following the above administrative action, then judicial action to be taken to quiet title; for recovery of back rentals; and for ejectment of the squatter-trespassers.
2. Quiet Title judicial action be taken on the rest of Blackbird Bend (surrounding the Barrett Survey Line). That would provide access to ascertain area between Barrett and center of 1867 river as well as accretions to that river.
3. Continue studies on additional areas on Iowa *side of the River upstream from Blackbird* Bend.

9/20/74 Letter to Director of Trust from Tribal Chairman endorsing 9/12/74 report and its recommendations.

10/1/74 Letter to Tribal Chairman from Commissioner responding to 9/20/74 letter assuring that "we will vigorously pursue" follow-up of the report recommendations.

10/15/74 Memorandum from Commissioner to Solicitor transmitting a proposed Secretarial Proclamation to establish Secretarial Boundary at Barrett Survey Line on Blackbird Bend.

1/30/75 Letter to Secretary from then-Congressman *Thone supporting Barrett Line Administrative* Boundary proposition.

2/3/75	Memorandum opinion from Solicitor to Commissioner. Agreed that position expressed in 9/12/74 report was legally correct but recommended initiating eviction, quiet title, and monetary recovery action in court rather than first following Secretarial Boundary Proclamation process.
3/11/75	Memorandum from Commissioner to Solicitor requesting non-referral to Justice of 2/3/75 opinion recommendations because studies on the extent of "quiet title" area were underway. Urged Secretarial Boundary be proclaimed then at Barrett Survey Line as recommended 10/15/74 and proposed possession and boundary posting prior to any litigation.
3/25/75	Memorandum from Commissioner to Solicitor seeking advice on his authority to proceed with BIA occupation and posting, preferably with proposed proclamation issued first. Response requested by 4/1.
3/28/75	Letter from Solicitor to Attorneys General of Iowa and Nebraska (with copies to potential defendants, state officials and Congressional delegations of both states) offering Director of Trust and Associate Solicitor for Indian Affairs to discuss resolution of Blackbird Bend controversy short of litigation.
3/31/75	Acting Commissioner Zuni, during meeting with Omaha Tribal Officials, approved and pledged support to Omaha Tribe in peacful entry and occupation of Blackbird Bend within the Barrett Survey Line and directed contractor E.M. Clark to assist in posting.
4/1 and 4/2/75	Omaha Tribe, with BIA police protection and Clark assistance, went into peaceful possession and posted Barrett Survey Line as the boundary.
4/3/75	Letter from Omaha Tribal Chairman to Monona County, Iowa, Assessor notifying of tribal possession of trust lands within Barrett Survey Line.
4/8/75	Conference in Commissioner's Conference Room—present were Commissioner, Director of Trust, Solicitor, Associate Solicitor for Indian Affairs; Tribal Officials, Veeder, Corke and the press.
	Director Seneca's summary of conclusions

reached at meeting:

1. Omahas would continue occupation of 4/2/75.
2. Solicitor ordered litigation report by Veeder to be delivered 8/1/75.
3. Commissioner still seeking authority to lease Blackbird Bend for farming and issuance of police regulations.
4. Continue discussions with States and involved parties in line with Solicitor's letter of 3/28/75.

4/9/75 Letter to E. M. Clark (then merged under VTN name) from COR Corke officially rejecting VTN report and De. Robinson's report.

4/10/75 Memorandum from Solicitor to Commissioner disagreeing with BIA (Seneca) summary of 4/8 meeting. Frizzell summary:

1. Urged end of occupation.
2. 8/1/75 date for litigation report was Veeder's date and Veeder to do it because "he had tribe's ear."
3. Had seen no request for opinion on farm lease of premises.
4. Doesn't condone occupation and supports litigation.

4/14/75 Letter to Solicitor from squatters' Attorney wanting a quiet title suit filed at earliest possible moment.

4/18/75 Meeting between Deputy Assistant Attorney General Kiechel and tribal officials where Mr. Kiechel pledged that no Blackbird Bend suit would be filed without tribal concurrence.

4/21/75 Letter to Deputy Assistant A. G. Kiechel from Tribal Chairman confirming 4/18/75 conversation.

4/21/75 Letter from Nebraska Attorney General to Solicitor responding to 3/28/75 letter. Stated no direct interest, but pointing out that Nebraska law of accretion is different from Iowa's.

4/23/75 Tenants of squatters Wilson and RGP, Inc. filed complaint in State Court, Onawa, Iowa, seeking Indian ejectment from Blackbird Bend and injunction against Tribal Chairman, Tribal Councilmen, and tribal employees as named individuals.

4/24/75 Meeting of Associate Solicitor for Indian Affairs Chambers (his office) and staff with Corke, Veeder and E. M. Clark to review progress of Omaha boundary investigations to that date.

4/25/75 Meeting at Department of Justice with Chief, General Litigation Section Floyd France (his office), France's Deputy Myles Flint, Herb Becker and Mariclare Hale from Interior Solicitor's Office, and Corke and E. M. Clark, Corke and Clark gave status report on investigations and recommended not filing quiet title proceeding until ongoing investigation to ascertain extent of Omaha meritorious claim to be completed by end of summer. It was emphasized to France and Flint that sufficient information was not available for initiating a complex quiet title suit. Corke and Clark learned that France and Flint had been communicating with squatters' attorney, exchanging information and France indicated agreement with squatters' desire for immediate filing of quiet title action by the United States, all prior to referral and without any factual knowledge. At meeting, Becker and Hale hand-delivered Solicitor's litigation report and recommendations to Justice. Corke later learned the recommendations were to file litigation to:

1. Quiet title.
2. Seek monetary damages for back rentals.
3. Obtain a restraining order against squatters.

4/28/75 Letter from Solicitor's Staff (Becker) to squatter attorney sending copy of VTN "rejected" report against tribe's wishes and to tribe's detriment.

4/29/75 Meeting with Messrs. Kiechel and France at Justice with the Omaha Tribal Chairman, four Council members and Veeder. Kiechel and France insisted that they would proceed to institute a case as requested by Interior with consequent ouster of Indians if that occurs, and that they would prepare the case after it was initiated.

4/30/75 Memorandum from BIA Director of Trust to Commissioner reporting on the 4/29 meeting between Tribe and Justice and urging Commissioner to ask the Solicitor to withdraw the case from Justice.

4/30/75 Letter from squatter attorney (Burke), to Solicitor (Becker) thanking him for sending a copy of the rejected VTN report and wanting VTN exhibits plus rejected Robinson report.

5/2/75 Letter from Senator Jackson, as Chairman of the Senate Interior Committee, to Secretary requesting status report on the Blackbird Bend matter and that no further action to quiet title be taken pending the status report.

5/2/75 Memorandum from Commissioner to Solicitor urging immediate action to have State Court ejectment case dismissed and expressing support of the tribe in request that no quiet title action be initiated until studies and evidence properly prepared.

5/2/75 Letter from Association on American Indian Affairs to Secretary requesting that the United States not initiate quiet title action, but rather proclaim Blackbird Bend trust property and provide police protection.

5/2/75 Deputy Solicitor to Justice requesting that no litigation be filed until discussion between Interior and Justice.

5/7/75 Letter to Solicitor from Governor Ray of Iowa stating a willingness to discuss but disagreeing that any avulsion occurred to form a basis for the opinion and any claim predicated thereon.

5/13/75 Trial in State court proceeding in Onawa, Iowa, on ejectment and injunction action brought by squatter's tenants on 4/23.

5/15/75 Onawa, Iowa Court ruled against special appearance filed by tribe attacking jurisdiction and issued writs of injunction against Cline, named tribal council members, and other Omaha tribal members.

5/15/75 Solicitor's Office (Becker) to squatter attorney Burke sending copy of "rejected" report of Dr. Robinson (again an unnecessary act potentially detrimental to tribe).

5/16/75 Letter from Solicitor to Senator Jackson giving a status report and purporting to justify conduct of Interior Solicitor in Blackbird Bend activities.

5/19/75 United States filed C75-4024 in U.S. District Court for the Northern District of Iowa (Western

Division) is Sioux City seeking quiet title to land within Barrett Survey Line on Blackbird Bend and an injunction to prevent enforcement of the State Court injunction against members of the tribe. Named defendants were: Wilson, Lakin, Jackson, Peterson, RGP, Inc., Travelers Insurance Co. and the State of Iowa.

5/19/75 Tribe passed Resolution No. 75-34 concurring in restraining motion only in United States complaint filed that day and resolving to hold United *States responsible if tribe removed from property* by the Court.

5/20/75 The Omaha Tribe filed a complaint in the U.S. District Court in Sioux City, C75-4026, repudiating the quiet title action by the United States and requesting a permanent injunction against squatters tenants.

5/20/75 Letter from Tribal Chairman to Solicitor giving notice of filing C75-4026 the previous day and condemning the 5/19 filing of C75-4024 by the United States quoting BIA's Director Seneca's statement that the filing was "a unilateral action by the Solicitor's Office without consultation with BIA." Resolution No. 75-34 was transmitted and *an immediate meeting was requested.*

5/21/75 Memorandum to Solicitor from Director, BIA Office of Trust, expanding on Corke memorandum of 4/9 rejecting the Clark VTN report of 9/16/74.

5/21/75 Letter from Tribal Chairman to Solicitor with a litany of charges against actions taken by Solicitor.

5/28/75 Judge McManus (in chambers) just before Noon on this Wednesday ordered briefs and affidavits *in cases 4024 and 4026 to be filed by Friday 5/30.* Assistant U.S. Attorney Sikma and Mariclare Hale from the Solicitor's Office represented the United States. They caught a 2-p.m. plane to Washington, D.C. Corke prepared affidavits for Sikma and for the tribe.

5/28/75 Omaha Tribe passed Resolution No. 75-40 opposing Justice complaint in C75-4024 and charging improper representation by DOJ before, during and following Judge McManus session in chambers.

5/30/75 Memorandum from Associate Solicitor to Commissioner transmitting a synopsis of 21 communications between Solicitor's Office and defendants counsel or State of Iowa during the period 3/28 thourgh 5/29/75.

5/30/75 Letter from Assistant U.S. Attorney, Sioux City to Judge McManus enclosing amended cover for affidavits. In Sikma's *absence*, the joint affidavit of Veeder and Corke for the tribe was erroneously attached to pleading under Sikma's signature.

6/2/75 Memorandum from Director of Administration Zuni to Commissioner explaining his actions as Acting Commissioner on 3/31 pledging support and assistance to the Omaha Tribe in peaceful entry and occupancy of Blackbird Bend and directly Clark to assist in posting the Barrett Survey Line. Zuni emphasized that the Commissioner is a line officer charged with making policy decisions with Solicitor only rendering advice and recommendations upon request.

6/3/75 *Tribe filed Application to Dismiss or Hold in* Abeyance the DOJ Case (C75-4024) supported by Tribal Resolution No. 75-40 dated 5/28/75 asserting inadequate representation by Justice and restating its opposition to the DOJ case.

6/5/75 Judge McManus granted the tribe's application for preliminary injunction and enjoined and restrained the squatter defendants from interfering with the use and occupancy of Blackbird Bend within the Barrett Survey Line by the Omaha Tribe and enjoined the Iowa Court proceeding. The Order stated that occupation by the Omaha Tribe with the assistance of BIA, in the capacity as executive agency, constitutes the status quo to be maintained. Profits from farming by the Omaha Tribe to be deposited with the Court. Judge McManus noted that the Omaha Tribe "*eschews a quiet title action" at that time.*

6/5/75 Letter from Senator Hruska to the Secretary commending the Interior Department (rather than BIA) for the decree of 6/5 allowing the tribe to remain on the disputed land.

6/6/75 Letter from Congressman Thone to Commissioner commending him for his support to the Omaha Tribe in their *major victory* in the Judge

McManus 6/5 order.

6/12/75 *Letter from Tribal Chairman to Secretary chronicling meeting of 6/11 in Director Seneca's office* with Justice and Interior Solicitor staffs where Chairman Cline and Councilman Gilpin were told they could sit-in but could not speak. Corke and Veeder also present. Asked Secretarial support and agreement that there would be no further court proceedings until proper data assembled.

7/7/75 Letter from Secretary Hathaway to Tribal Chairman Cline soft-pedaling the treatment at 6/11 meeting.

8/12/75 Memorandum to Associate Solicitor-Indian Affairs from BIA Director of Trust advising that all information gathered under BIA contracts, both direct with consultants and through the Omaha Tribe, will be made available to Solicitor and Justice in Denver during the week of August 18 under the condition that none will be made available in any way to the Defendants.

8/27-31/75 Mr. Frank Swenson, *the first expert employed by* Justice, was given thorough briefing, tour and orientation on Omaha Tribe's investigations to that date at request of Solicitor's Office. Involved for the tribe were Clark, Robinson, Veeder and Corke.

4th week of 9/75 Meeting in Assistant Attorney General's (Land and Natural Resources Division) Conference Room with Deputy Assistant Attorney General Kiechel, Mr. Flint, representative from Interior Solicitor's Office, the Tribal Chairman and three council members, *Tribal Attorney Don O'Brien*, Veeder and Corke. Purpose of meeting was to urge the United States to join the Omaha Tribe in their *total* case along the eastern (Missouri River) boundary in Iowa. Following the tribal presentation, Mr. Kiechel said that they would await formal recommendations from Interior before deciding. The tribe advised that their complaint was drafted encompassing all of the areas in Iowa deemed from studies to merit assertion.

10/1/75 Memorandum from Associate Solicitor Chambers to Director of Trust Seneca about the meeting at the Department of Justice the previous

week (see entry immediately above). All information relating to tribal claims was requested so Interior could develop a position and convey it to Justice.

10/6/75 The Omaha Tribe of Nebraska filed suit (C75-4067), in the U.S. District Court in Sioux City, to quiet title to more than 11,000 acres of land in Monona County, Iowa and for damages of $50 million, naming some 100 defendants. Complaint was "approved" by Interior prior to filing.

10/21/75 Letters from Assistant Attorney General to Interior seeking a recommendation on the "larger claims" of the Omaha Tribe recently filed. Two letters raised two questions: Should complaint in 4024 be amended to name Sorenson and should 4067 and 4024 be consolidated for trial?

11/3/75 Meeting at Marina Inn, South Sioux City, Nebraska, with Jim Clear from Justice and his expert (Mr. Swenson), Associate Solicitor Chambers, BIA Director of Trust Seneca, entire Omaha Tribal Council, Tribal Attorney O'Brien, Veeder, Corke, Clark and Robinson. The tribe displayed on maps and in oral presentation the extent and basis of the tribe's claim in C75-4067 with special emphasis on the entire Blackbird Bend area of 6,300 acres.

11/7/75 Memorandum from Veeder to Director, BIA Office of Trust Responsibilities, recommending joinder by Justice in tribe's case, C75-4067. As directed, he presented reasons which should impel DOJ and Interior Solicitor to join the tribe and thus broaden their C75-4024 to conform with physical evidence now known to exist. He pointed out that Mr. Swenson, the expert for Justice, concurs with the tribe's conclusion regarding the rest of Blackbird Bend. The deficiencies of the complaint filed by the United States in 4024 were listed.

11/19/75 Memorandum from Veeder to BIA Director of Trust recommending the Justice case (4024) be consolidated with the tribe's case (4067) for trial in order to facilitate early trial. The only remedy available to the Tribe to rectify the deficiencies in the Justice complaint was to file their complaint in C75-4067. By mid-November 1975, it bacame obvious that Justice was not going to join

in the Tribes case, at least in the reasonable future.

11/26/75 Letter from Assistant Attorney General Taft to Under Secretary Frizzell seeking all of the information developed by the Omaha Tribe.

12/2/75 Letter from Solicitor to Assistant Attorney General replying to Kiechel's two letters of 10/21. Recommended that Justice not amend their complaint but rather to file a motion for consolidation for trial as was recommended by Veeder in his 11/19 memorandum to BIA Director of Trust Seneca to be the end that the matter could be tried at an early date. Letter was similar to proposed letter attached to Veeder 11/19 memorandum to Seneca.

12/4/75 Tribal Resolution No. 76-24 passed asserting tribal ownership of all information in expert E. M. Clarks possession.

12/5/75 Meeting in Under Secretary Frizzell's office with BIA staff and tribal officials requesting the tribe to come to Justice Department in Washington, D.C., to review the evidence the tribe has or is assmembling.

12/8/75 Letter from BIA Director of Trust to Tribal Chairman urging presentation of tribe's evidence to DOJ "which seems to be the condition for Justice joinder in tribe's case".

12/17/75 Letter from Chairman Cline to BIA Director of Trust agreeing to a "turnover of evidence" meeting but wanted it to be held in Nebraska because of tribal travel costs.

12/31/75 Motion by *Omaha Tribe* to consolidate the cases for trial.

1/26/76 Judge McManus ordered consolidation of cases 4024 and 4026 with 4067 for trial.

On or about 2/13/76- [a Friday p.m.] Meeting in Interior, Room 5141. Present were at least Assistant Attorney General Taft, Deputy Assistant A.G. Kiechel, Myles Flint, Solicitor Frizzell, Deputy Solicitor Lindgren, Associate Solicitor Chambers, Commissioner Thompson, Director of Trust Seneca, Omaha Tribal Officials, Veeder and Corke. Justice and Solicitor's Office sought total turnover of the tribe's evidence. The tribe, supported by the Commissiomer and the

Director of Office of Trust Responsibilities, resisted because everything (including rejected reports) given to Interior or Justice turned up in the hands of the defendants lawyers immediately thereafter. The tribe agreed to turn over information and data collected under contracts with BIA but would continue to withhold interpretations of such data.

2/16-19/76 Data collected, sorted, packed and shipped to Acting Solicitor Lindgren as agreed by the Omaha Tribe on the previous Friday night.

4/5/76 Judge McManus granted the Omaha Tribe summary judgment, striking down the defenses by the defendants of adverse possession, statute of limitations, laches, estoppel and abandonment from use. The court also ordered the tribe's case No. C75-4067 severed with respect to issues of damages and all issues concerning land not within the Barrett Survey Line.

4/76 About 30 defendants were, by agreement, dismissed from the tribe's case.

4/76 Veeder given IPA assignment to NCAI so that he could represent Omahas and Colvilles in litigation as requested by those tribes.

9/7/76 Pre-trail scheduled in Sioux City but there was no exchange of exhibits because neither Justice nor defendants were prepared.

9/23/76 Omaha Tribe a motion to court to offer its evidence prior to DOJ and to have DOJ aligned as adversary party.

10/12/76 Pre-trial.

10/14-15/76 Depositions of tribe's Expert Witnesses Clark and Robinson.

10/26/76 Court order for tribe to go first at trial and denying tribe's rights to object, cross-examine or offer rebuttal to goverment case.

11/1/76 Trial for 4024 and 4026 and the Barrett Survey Line portion of 4067 began before Judge Bogue of Rapid City brought in to try the case.

11/15/76 (See Transcript Volume 11, pages 1439-1453 and 1466-1477). When the tribe rested, Counsel filed a "Motion and Objection to the Introduction of Evidence by the Justice Department in the Consolidated Cases" (pages 1441-1450) counter-

signed by Chairman Cline and Corke as BIA representative in these consolidated cases. The deficiencies of the Justice complaint and representation are chronicled in the motion. Following a recess, the Court from the bench expressed the situation as "mind-boggling to say the least" with Corke and Veeder working for the tribe with both funded by Interior, Corke representing a Bureau in Interior and the Solicitor asking Justice to prosecute the case. He referred to "the bumbling of the Interior Department in this case." The Court then ruled that the tribe could cross-examine the Justice witnesses and upon inquiry Justice stated they did not wish to cross-examine the tribe's witnesses. Counsel for Sorenson at this point in trial (pages 1451-1453) asked to be excused and not be assessed for transcript costs during the U.S. Government case because Sorenson was not named a party by the United States. Judge Bogue didn't release and left the decision to discretion of Sorenson Counsel. The cost of transcript motion was denied and the United States proceeded.

2/15/77 Briefs and proposed Findings of Fact and Conclusions of Law filed.

5/4/77 Judge Bogue rendered opinion and decree ruling against the tribe and the United States.

6/13/77 Appeal of the Bogue Opinion was heard in St. Paul by a three judge panel of the 8th Circuit Court of Appeals. The fatuousness of the system where the Appellate Division of Justice takes up cases on appeal without knowledge of facts was demonstrated by the performance of Mr. Shawaker who appeared for Justice.

4/11/78 The decision of the 8th Circuit came down overruling Judge Bogue.

4/27/78 Petition for rehearing by defendants denied. They appealed to the U.S. Supreme Court for a Writ of Certiorari.

3/2/79 Veeder informed by Interior that there would be no further extension of his IPA assignment. He elected to retire rather than return to Interior conditioned upon Under Secretary's commitment to continue funding the ongoing litigation at Colville and Omaha to completion.

3/21/79	Blackbird Bend case argued before the Supreme Court.
6/20/79	Supreme Court ruled that all defendants were "white" under 25 U.S.C. 194 except the State of Iowa and that Nebraska law should be applied to the question of avulsion and accretion.
1/15/80	The 8th Circuit Court of Appeals ruled on remand from the Supreme Court generally favorable to the Omaha Tribe.
10/6/80	Supreme Court denied certiorari to defendants on appeal of 8th Circuit ruling of 1/15.
10/31/80	Judgment mandate by 8th Circuit to District Court.
11/21/80	Pre-trial conference in Cedar Rapids for Claims of (1) State of Iowa (not covered under 25 U.S.C. 194); (2) ownership of land excluded in Justice complaint in 4024; and (3) reimbursement of defendants for improvements.
3/25/81	Letter to Secretary from Senators Grassley and Jepsen and Congressman Bedell protesting BIA funding of Omaha Tribe's attorney.
3/25/81	Meeting in Interior Building between Bedell with Iowa constituent defendants (in tribes case C75-4067) and BIA officials where joint letter (see prior entry) was hand-delivered and its content reiterated in person.
6/11/81	Meeting in Senator Grassley's office with BIA staff delivering response to 3/25/81 letter and discussing the issue with the Senator and staff.
Throughout the rest of 1981	Exchanges of correspondence between Grassley and Interior on Veeder contract funding. Exon and Bereuter of Nebraska by letters supported continued funding.
9/11/81	On remand from the 8th Circuit, Judge Bogue entered judgment in favor of Omaha Tribe and the United States quieting title against all of the defendants within the Barrett Survey Line.
12/2-8/81	Defendants filed notice of appeal with the 8th Circuit Court of Appeals.
2/26/82	Letter to Veeder from Assistant Secretary Smith approving Omaha contract extension but with no funding after 3/30.
2/27/82	Meeting with Deputy Assistant Secretary Samp-

sel (his office) attended by Wyman Babby of BIA, staff from Senator Exon and Congressman Bereuter offices and tribal officials. Sampsel candidiy informed group that the reason for the 2/26 Smith letter was that Secretary Watt and Senator Grassley had "cut a deal" during July 1981 whereby Watt promised no further funding to the Omahas for Veeder in return for Grassley not holding the FY 1982 Interior Appropriations Bill hostage.

3/3/82 Jack Anderson's column on the Watt-Grassley deal.

5/18/82 Oral argument in St. Paul before three judge panel of the 8th Circuit Court of Appeals. Mr. Martin Green of the Appellate Division in DOJ represented the United States. Mr. Green elected to only argue on the issue of reimbursement to the defendants for improvements by the squatters while occupying the property. However, near the end of the session he was asked by the chairman of the panel why the United States had excluded the 700 acres of land from its original complaint. Instead of replying that he did not know (which was certainly the situation), he blurted out that it was because, in DOJ's opinion, the tribe was not entitled to the land. The session ended very shortly thereafter and Mr. Green expressed dismay because the Omaha Tribal Council, who were all in attendance, refused to shake his hand.

FY 1982 Congress appropriated $864,000 (of the $900,000 requested in the President's budget) for irrigation development on the Blackbird Bend irrigation unit on the Omaha Indian Reservation, Iowa.

6/2/82 The Omaha Tribe entered into a P.L. 93-638 contract for design and construction of nine wells, pumps and center-pivot sprinkler systems to serve 1,760 acres of the Blackbird Bend irrigation unit. The Tribe completed the installation in time for use during the 1983 cropping season. The application of about 6 inches of water, when needed by the crop, during the hot, dry months of July and August, meant the difference between a crop failure and a bumper corn crop.

10/26/82 Eighth Circuit Court ruled (Omaha III) as amended 12/1/82 following denial of cert by

Supreme Court on improvements issue brought by DOJ.

6/10/83 Eighth Circuit Court of Appeals remanded to District Court to rule whether trial record supported the Tribe's ownership of the "fee patent and Iowa acreage".

1/13/84 District Court Judge Bogue on remand ruled against the Tribe on the State of Iowa claim and on the 700 acres of so-called fee patent lands within the Barrett Survey Line.

3/6/84 Letter from Jim Clear, DOJ, to the Court with a proposed order stating that the 1/13/84 judgment was not final. In his letter it was noted that all other parties had accepted the order to be final and that the Tribe had filed notice of appeal.

3/12/84 The Court adopted Clear's proposal and made the 1/13/84 order "not a final, appealable judgment".

4/16/84 Defendants letter to Clear, DOJ, wanting survey completed so that crops could be planted by defendants on the land. They stated their expectation to fence and farm in 1984.

6/11/84 Court ordered BLM survey of the fee patent land and Iowa legal descriptions of those lands plus filing of a report on the unresolved issues on the 1976 resurvey of the Barrett Meander Line.

6/26/84 Meeting between DOJ, Interior Solicitors, BLM Cadastral Survey Eastern States staff, and Tribe as directed by Court in 6/11/84 order. Tribe sought DOJ-Tribe joint filing to Court to have settled the title issue first prior to any survey. Also, to incidentially point out that Iowa descriptions would be "unofficial, unauthorized" information not shown on a plat but discussed in the report. Clear agreed that the title/survey position of the Tribe was reasonable but he would have to check with "his guys".

6/30/84 Clear reported that DOJ would not join the Tribe (see 6/26 request) but would not oppose.

(Sorenson trespass chronology not included but available.)

APPENDIX X

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN R. WILSON, *et al.*,
Defendants.

C 75-4024

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, *et al.*,
Defendants.

C 75-4026

ORDER
(filed Feb. 21, 1986)

OMAHA INDIAN TRIBE,
Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

C 75-4067

This matter is before the court on the Omaha Indian Tribe's (Tribe) resisted motion to disqualify, filed November 7, 1985; the Tribe's resisted motion for summary judgment, filed January 9, 1986; and the United States' request for sanctions, filed January 31, 1986. The Tribe's motion for oral argument is denied and the motions will be decided on the existing record. Motions to disqualify and for summary judgment denied; request for sanctions granted.

Motion to Disqualify

The Tribe seeks to disqualify Evan L. Hultman, United States Attorney for the Northern District of Iowa, and James J. Clear and their successors in this litigation and to enjoin them and their successors from further participation in these cases. The Tribe also seeks to strike the complaint in *United States v. Wilson*, No. C 75-4024 (Wilson); to strike the consolidation order in these cases; to enlarge the scope of *Omaha Indian Tribe v. Agricultural & Industrial Investment Corp.*, No. C 75-4067 (Agricultural), to encompass 6,390 acres; to proceed to final judgment in *Agricultural* for the entire Blackbird Bend area; to order Mr. Hultman and Mr. Clear to appear in court to face charges of fraudulent misconduct; to order Myles Flint, Deputy Assistant Attorney General, to appear in court and explain the background of the *Wilson* complaint; and to order Mr. Hultman and Mr. Clear to pay the Tribe's costs in this action. The Tribe argues that Mr. Hultman's prior conduct as Attorney General for defendant State of Iowa in *Lakin v. Iowa* and *Peterson v. Iowa*, disclaiming any interest in certain portions of the Blackbird Belnd Area, led to his filing of a limited complaint in *Wilson* which abandoned thousands of acres of tribal land.

The Tribe's motion to disqualify is clearly untimely and merits no serious attention or consideration. This case has been pending for over ten years and has been reviewed once by the Supreme Court and three times by the Eighth Circuit Court of Appeals. The alleged misconduct of Mr. Hultman occurred over ten years ago and the Tribe was aware of its claim in 1975. Accordingly, the motion will be summarily rejected. *See State of Arkansas v. Dean Food Products Co., Inc.*, 605 F.2d 380, 384 (8th Cir. 1979); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975).

The Tribe once again seeks to attack the 1976 severance order and Judge Bogue's January 13, 1984 order in an attempt to quiet title to lands outside the Barrett Survey in the Tribe. The court continues to deny reconsideration of Judge Bogue's January 13, 1984 order and the 1976 severance order. The

court finds the Tribe's unending assertions of these requests to be meritless.

Motion for Summary Judgment

The Tribe moves for summary judgment against Evan L. Hultman, United States Attorney; Myles E. Flint, Deputy Assistant Attorney General; and James J. Clear, Attorney, Department of Justice. These attorneys are not parties to this lawsuit and a motion for summary judgment against nonparties is frivolous. Accordingly, the motion will be denied.

Request for Sanctions

The United States urges the court to impose sanctions on the Tribe's counsel pursuant to FRCP 11, 28 USC § 1927 and Local Rule 2.2.8.

Rule 11 provides in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation .... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because

of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Tribe's summary judgment motion is so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted. The arguments presented duplicate the Tribe's motion to disqualify, and the motion seeks judgment against nonparties which is patently frivolous. Accordingly, sanctions will be imposed on the Tribe's counsel who signed the motion for summary judgment.

It is therefore

ORDERED

1. Motion to disqualify denied.

2. Motion for summary judgment denied.

3. Request for sanctions granted. The parties who opposed the motion for summary judgment shall file an itemized list of their expenses incurred in resisting the motion by not later than March 20, 1986. The Tribe may file a written response by not later than April 4, 1986.

February 21, 1986.

EDWARD J. MCMANUS

Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX Y

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

ROY TIBBALS WILSON, et al.,

Defendants.

CIV. NO. C 75-4024
APPLICATION TO DISMISS OR HOLD IN ABEYANCE

June 3, 1975

COMES NOW the Omaha Tribe of Nebraska and having carefully considered this matter hereby respectfully prays to the Court as follows:

1. That this Court either dismiss or hold in abeyance this cause, entitled *United States of America* v. *Roy Tibbals Wilson,* et al., for the following reasons:

a. That this Tribe strongly feels that it has not been adequately represented by the Department of Justice, all as set forth in the attached Resolution No. 75-40, which Resolution precisely and clearly sets out our position and complaints in regard to the actions and failure to act on the part of the Department of Justice.

b. That to consider this matter further would be irreparably harmful to the Omaha Tribe of Nebraska.

c. The Omaha Indian Tribe has steadfastly and repeatedly opposed the action of the Department of Justice in this case, all as more fully reflected in the case of *Omaha Tribe* v. *Jackson,* et al., Civil No. C 75-4076 and that Complaint and attachments are incorporated into this Application by reference.

d. There is likewise incorporated into this Application by reference and made a part of it a Memorandum

of Points and Authorities filed by the Omaha Tribe in the case No. C 75-4026 and the Affidavit in support of that Memorandum.

2. In the event the Court proceeds to consider the ca of *United States of America* v. *Roy Tibbals Wilson*, et al. Omaha Indian Tribe respectfully petitions this Court to have a full hearing in regard to the exhibits that were offered in evidence, unsupported allegations that have been made, and the right fully to cross-examine all of the affiants and any experts relied upon by the defendants in No. C 75-4024 or any reports in the hands of the defendants and upon which they are relying.

WHEREFORE, the Omaha Tribe of Nebraska prays that this Court either dismiss or hold in abeyance this cause and/or in the alternative, grant the Omaha Tribe of Nebraska the full rights in a hearing as set out above. Otherwise, the Tribe declares that it has been denied its day in court.

Respectfully submitted
OMAHA TRIBE OF NEBRASKA

By _____

JOHN T. O'BRIEN
916 Grandview Boulevard
Sioux City, Iowa 51101
Ph. (712) 255-0147
Its Attorney

APPENDIX Z

United States District Court

NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 75-4024

ROY TIBBALS WILSON, *et al.*,

Defendants.

PLAINTIFF'S RESPONSE TO OMAHA TRIBE OF NEBRASKA'S "APPLICATION TO DISMISS OR HOLD IN ABEYANCE"

Statement

The Omaha Tribe of Nebraska has filed an "Application to Dismiss or Hold in Abeyance" this case on the grounds that:

(1) the tribe feels strongly that it has not been adequately represented by the Department of Justice:

(2) the tribe will be irreparably harmed if this case is heard by this court; and

(3) the Omaha Tribe has steadfastly and repeatedly opposed the action of the Department of Justice.

The Omaha Tribe of Nebraska is not a party to this action. It has instituted a separated action entitled *Omaha Tribe v. Harold Jackson, et al.*, No. C-75-4026, in which the tribe claims that the Blackbird Bend area is held in trust for the tribe by the United States. The United States is not a party to that litigation. Although the tribe states that it will suffer irreparable injury if this case *is heard* by this court, there is nothing in the "Application" which informs us what

the harm will be and the tribe's statement is therefore not discussed in this memorandum.

Argument

I. THE UNITED STATES IS A REAL PARTY IN INTEREST IN THIS ACTION AND IS NOT SUING MERELY AS A REPRESENTATIVE OF THE OMAHA TRIBE OF NEBRASKA

The Omaha reservation in Nebraska was established pursuant to the provisions of Article I of the Treaty of March 16, 1854, 10 Stat. 1043. The lands reserved for the tribe under that treaty are held in trust by the United States and cannot be sold, granted or leased by the tribe without the consent of the United States. 25 U.S.C. 177. The United States as trustee of the lands undoubtedly has the capacity to bring suit in this case. F.R.Civ.P. 17(a).

However, the United States has sufficient interest in its own right to bring suit when Indian treaty or statutory rights are violated and, in filing an action, the United States acts not only as trustee but also on its own behalf. *Privett v. United States*, 256 U.S. 201 (1921).

As was said in *Heckman v. United States*, 224 U.S. 413 (1912), the " . . . national interest is not to be expressed in rights incident to ownership of a reservation or a holding of a technical title in trust." 224 U.S. at 437. Holding that the power of the Federal Government to restrict alienation of Indian land necessarily involves the power to enforce the restrictions, the *Heckman* Court cited with approval the lower court's language that an illegal alienation of Indian land " . . . is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." 224 U.S. at 438. In litigating questions of title to Indian land, the interest of the United States " . . . arises out of its guardianship over the Indians *and* out of its right to

invoke the aid of a court of equity in removing obstacles to the fulfillment of its obligations; and in *both* aspects the interest is one which is vested in it as a sovereign." (Emphasis added). *United States v. Minnesota*, 270 U.S. 181, 194 (1926).

"Where restrictions on land are transgressed, the Government can choose such legal remedies as are necessary to protect the Indian. It may maintain an action to quiet title to land . . . " Cohen, *Handbook of Federal Indian Law*, p. 368, United States Department of the Interior (GPO, 1942) citing *United States v. Jackson*, 280 U.S. 183 (1930); *United States v. Title Insurance Co.*, 265 U.S. 47" (1924); *United States v. Atkins*, 250 U.S. 220 (1922); and *United States v. Wildcat*, 224 U.S. 111 (1917).

II. THE UNITED STATES ALONE CAN DETERMINE THE COURSE OF AN ACTION WHICH IT INSTITUTES TO ENFORCE INDIAN RIGHTS

"There can be no more complete representation than that on the part of the United States in acting on behalf of these dependants—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquistence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of Indians under its care, and it recognizes no limitation that are inconsistent with the discharge of the national duty." *Heckman v. United States*, 224 U.S. 413, 444-445 (1912).

The Omaha Tribe's "Application" that the court dismiss the lawsuit is an attempt to nullify the effort of the United States to "discharge the national duty." The "Application" is designed not to control the litigation, but to obviate it. It implies that federal restrictions on alienation of tribal property are applicable only when a tribal council desires them to be. The Federal Government, however, holds land in trust for an entire tribe and for future members of the tribe. The restrictions on alienation are applicable not only to fraudulent

or improvident conveyance but to all alienations undertaken without the consent of Congress. The tribe cannot circumvent congressional authority by blocking efforts of the United States to quiet title to land. To allow a tribe to frustrate an attempt by the United States to enforce these restrictions would mean that a tribe could void the restrictions themselves.

"The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys for the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians." *Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 14 (C.A. 10, 1931). In this case the guardianhip authority of the United States is directly threatened by the tribal attorney's "Application". As indicated by the terms of this Court's opinion and order, this Court has authority to enjoin enforcement of the injunction issued by the State district court in Monona County only in an action brought by the United States, 28 U.S.C. 2283. If the action brought by the United States is dismissed as requested by the tribe, this Court would be without authority to enjoin enforcement of the State court injunction.

III. THE UNITED STATES ATTORNEY IS AUTHORIZED TO REPRESENT THE PLAINTIFF IN THIS ACTION.

The Act of September 6, 1966, 80 Stat. 613, 28 U.S.C. 516, reserves to officers of the Department of Justice, under the direction of the Attorney General, the conduct of litigation to which the United States is a party. The United States Attorney and his assistants are officers of the Department of Justice and, by statute, are authorized to prosecute, for the Government, all civil actions in which the United States is concerned. 28 U.S.C. 547.

This action was filed by the United States Attorney with the consent of, and at the direction of, officers of the

Department of Justice acting under the direction of the Attorney General and at the request of the Department of the Interior. No attorney in private practice and no officer or attorney in any agency of the United States other than the Department of Justice has been, or is, authorized to represent the United States in this case. There is no allegation in the tribe's "Application" that the United States Attorney or his assistants have violated any instructions received by them from the Department of Justice.

Conclusion

The United States is authorized to bring, and has brought, this suit in its own name to assert its own interest in preserving title to land owned by its in trust for the Omaha Tribe of Nebraska. The action was not brought by the Government merely as attorney or agent for the Omaha Tribe, but in the name of the United States to assert a separate and distinct governmental interest in the lands in dispute. The United States Attorney and his assistants are authorized by statute to represent the United States. The Omaha Tribe of Nebraska is not a party to this litigation and has made no effort to intervene.

The "Application" of the Omaha Tribe is therefore without a legal basis and should be stricken.

EVAN L. HULTMAN

EVAN L. HULTMAN, Esquire
United States Attorney
Northern District of Iowa

By: ROBERT L. SIKMA

ROBERT L. SIKMA, Esquire
Assistant United States Attorney

APPENDIX AA

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff, **No. C 75-4024**

vs. **ORDER**

(filed
ROY TIBBALS WILSON, *et al.*, **July 1, 1995)**
Defendants.

This matter is before the court on the resisted motion to dismiss or hold in abeyance filed by the Omaha Indian Tribe of Nebraska on June 3, 1975.

The Omaha Indian Tribe of Nebraska, a tribe organized under 25 USC §476, is not a party to this action and has not sought to intervene, but rather has commenced its own action, No. C 75-4026 (filed N.D. Ia. May 20, 1975), against the same defendants. Plaintiffs in both suits ask preliminary and permanent injunctive relief, with the United States in the instant case additionally seeking to quiet title to the controverted lands.

By order of June 5, 1975, the court issued a preliminary injunction in favor of the plaintiff in this case and in No. C 75-4026. The Tribe now request that the court dismiss the action instituted by the government or hold it in abeyance pending resolution of the Tribe's suite, apparently on the ground that the government's actions prior to and including the filing of this action have been and will continue to be ineffective in protecting rights of the tribal member to the lands in question. The court finds this contention to be without merit at this time.

The United States is a real party in interest to an its right to invoke the aid of a court of equity in removing unlawful

obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." Id. at 194. The governmental rights of the United States as well as the proprietary rights of the tribal members are at stake. *Hackman v. United States*, 224 U.S. 413, 437-38; 32 S.Ct. 424, 56 L.Ed. 820 (1912).

In sustaining jurisdiction over a suit in equity to enjoin trespass on Indian lands, the Fourth Circuit Court of Appeals stated;

> It is the right and the duty of the government to maintain such suits as may be necessary for the protection of its Indian wards. And particularly is this true where the Untied States holds lands in trust for the use and benefit of these wards and suit is necessary for the protection of the lands. (Citations omitted.) *United States v. Colvard*, 89 F.2d 312, 313 (4th Cir. 1937).

The court finds no reason to dismiss or abate the government's efforts here to effectuate its rights and carry out its obligations.

It is therefore

ORDERED

Denied.

June 30, 1975.

EDWARD J. MCMANUS

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX BB

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C 75-4067

OMAHA INDIAN TRIBE, ETC.,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, et al.,

Defendants.

ANSWER OF DEFENDANTS ROY TIBBALS WILSON, HAROLD JACKSON, CHARLES E. LAKIN, AND FLORENCE LAKIN

For answer to Claim No. 1 of plaintiff's complaint the defendants, Roy Tibbals Wilson, Harold Jackson, Charles E. Lakin and Florence Lakin, admit, deny and allege as follows:

1. Admit that the Omaha Indian Tribe is organized under a constitution and by-laws duly ratified and approved as required by law, that said constitution and by-laws or charter authorizes and empowers said tribe to sue and to be sued; that this action involves the Omaha Indian Tribe; that the value of the lands involved exceeds $10,000.00. These defendants deny the other allegations contained in paragraph 1 of plaintiff's complaint.

2. These defendants disclaim any interest in the lands referred to and described in plaintiff's complaint and exhibits A and B attached thereto, as Tract II, Monona Bend, and Tract III, Omaha Mission Bend, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations with regard to said tracts in plaintiff's complaint.

3. Admit that the lands which constitute the Omaha Indian Reservation are held by the United States in trust for

the Omaha Indian Tribe, but deny that the lands involved in this suit, the lands described in plaintiffs complaint as Tract I, Blackbird Bend, are a part of said reservation and deny that they are held in trust by the United States for the Omaha Indian tribe.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of plaintiff's complaint.

5. Admit the allegations of paragraphs 4 and 5 of plaintiff's complaint.

6. Deny the allegatons of paragraph 6 of plaintiff's complaint.

7. With respect to paragraphs 7,8,9 and 10 of plaintiff's complaint, these answering defendants admit that the exhibits A and B, attached to and made a part of plaintiff's complaint, contain a description of land there referred to as "Tract I, the Blackbird Bend Area," claimed in said complaint to be a part of the Omaha Indian Reservation, but these defendants deny each and every other allegation in said paragraphs 7, 8, 9 and 10 contained and specifically deny that either the plaintiff or the United States of America owns all or any part of the land contained in said Tract I, and deny that all or any of said land is a part of the Omaha Indian Reservation, and deny that it is held in trust by the United States of America for the Omaha Indian Tribe.

APPENDIX CC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4067

OMAHA INDIAN TRIBE, ET AL.,

Plaintiff,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT COMPANY, ET AL.,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFANDANTS RGP, Inc. and OTIS PETERSON

For answer to Claim No. 1 of Plaintiff's Complaint, the defendants, RGP, Inc. and Otis Peterson, admit, deny and allege as follows:

1. Admit that the Omaha Indian Tribe is organized under a constitution and by-laws duly ratified and approved as required by law, and that said constitution and by-laws or charter authorizes and empowers said tribe to sue and to be sued; that this action involves the Omaha Indian Tribe; that the value of the lands involved exceeds $10,000.00. These defendants deny the other allegations contained in paragraph 1 of plaintiff's complaint.

2. These defendants disclaim any interest in the lands referred to and described in plaintiff's complaint and exhibits A and B attached hereto, as Tract II, Monona Bend, and Tract III, Omaha Mission Bend, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations with regard to said tracts in plaintiff's complaint.

3. Admit that the lands which constitute the Omaha Indian Reservation are held by the United States in trust for

the Omaha Indian tribe, but deny that the lands involved in this suit, the lands described in plaintiff's complaint as Tract I, Blackbird Bend, are a part of said reservation and deny that they are held in trust by the United States for the Omaha Indian Tribe.

4. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 plaintiff's complaint.

5. Admit the allegations of paragraphs 4 and 5 of plaintiff's complaint.

6. Deny the allegations of paragraph 6 of plaintiff's complaint.

7. With respect to paragraphs 7, 8, 9 and 10 of plaintiff's complaint, these answering defendants admit that the exhibits A and B, attached to and made a part of plaintiff's complaint, contain a description of land there referred to as "Tract I, the Blackbird Bend Area," claimed in said complaint to be a part of the Omaha Indian Reservation, but these defendants deny each and every other allegation in said paragraphs 7, 8, 9 and 10 contained and specifically deny that either the plaintiff or the United States of America owns all or any part of the land contained in said Tract I, and deny that all or any of said land is a part of the Omaha Indian Reservation, and deny that it is held in trust by the United States of America for the Omaha Indian Tribe.

8. With respect to paragraphs 11, 12, 13 and 14 of plaintiff's complaint, these defendants admit that in April and May of 1867, when the General Land Office survey was made by T. H. Barrett, surveyor, land which could be described as in Exhibits "C" and "C-1" attached to plaintiff's complaint (but of course without reference to the 1943 Iowa-Nebraska Compact Line or to the east or left bank of the Missouri River) existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River. All of said land was eroded away by the action of the Missouri River between the years 1867 and 1943 and ceased to exist at the described

location, having been washed down the river. New land was created between the years 1867 and 1943 by the process of accretion to the left or Iowa bank of the Missouri River which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described in said Exhibits "C" and "C-1" and over all of the rest of the area referred to in plaintiff's complaint as Tract I, Blackbird Bend, which in 1867 or at any time since then was occupied by any part of the channel of the Missouri River. Land was thereafter added by the process of accretion to the left or Iowa bank of the Missouri River west of said Compact Line and east of the present Missouri River channel. All of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa Bank of the Missouri River to whose land it had accreted. By mesne conveyances from said riparian owners or from persons who obtained title from or against them, defendant RGP, Inc. became and is now the owner in fee simple of the portion of said accretion land which falls within the borders of tracts of land owned by it and appropriately described by Iowa section, township and range numbers as follows:

RGP, Inc. is the owner in fee simple of the following land situated in Monona County, Iowa:

(Land description omitted in printing.)

RGP, Inc. leased the above land to the defendant, Otis Peterson, under written lease dated January 28, 1967 for a term of ten years from March 1, 1967 to March 1, 1977 and Otis Peterson is entitled to possession of said land under said lease.

Although the land described in said Exhibits "C" and "C-1" was in 1867 a part of the Omaha Indian Reservation to which the United States held title for the use and benefit of the Omaha Tribe of Indians, said title was extinguished when said land ceased to exist when it was eroded away and washed down the river. These answering defendants deny each and every allegation of Paragraphs 11, 12, 13 and 14 of plantiff's complaint not hereinabove admitted.

9. As an additional and separate defense these answering defendants allege that the defendant, RGP, Inc. and its predecessors in title have been in actual, open, notorious, exclusive, continuous and adverse possession of the lands described in paragraph 8 hereof under color or title for more than ten years (approximately forty years as alleged by plaintiff) prior to the assertion of any claim thereto by plaintiff, and the pertinent statute of limitations precludes plaintiff from effectively asserting any claim of title or interest in said property, and has extinguished any right, title or interest it might otherwise have had in said land.

10. As an additional and separate defense these answering defendants allege that prior to April 2, 1975, the plantiff had not contested the ownership and possession of said land by said defendants and their predecessors in title but had acquiesced in the same; that relying on the foregoing acquiescence of the plaintiff, defendant RGP, Inc. and its predecessors in title purchased said land from the apparent owners thereof, paid taxes on said land, cleared it of trees and otherwise prepared it for cultivation, constructed dikes and dug drainage ditches, all involving great expense to the defendant and its predecessors in title. Also, witnesses who had knowledge of the action of the Missouri River in the vicinity of the land described in Exhibits "C" and "C-1" attached to plaintiff's complaint and in paragraph 8 of this answer, and of what effect such action had with respect to said land, have died and, due to the delay by the plaintiff in asserting its claim, said witnesses are unavailable to testify. By reason of the foregoing the defendants will be greatly prejudiced if the plaintiff is permitted to assert its claim effectively at this time, and the plaintiff by reason of its laches is estopped from claiming or asserting any title it might otherwise have in said tracts described in paragraph 8 hereof or in any part thereof.

11. These defendants deny that the plaintiff is entitled to any judgment as claimed in plaintiff's complaint, and allege that the defendant, RGP, Inc. is entitled to a judgment quieting title in fee simple in it to the land described in paragraph 8 thereof as owned by it, and upholding its right

to possession thereof as against the claims of the plaintiff and the Omaha Tribe of Indians but subject to the rights of the defendant, Otis Peterson, under his lease above described. The defendant, RGP, Inc. is entitled to an order declaring that the Omaha Tribe of Indians has no right, title or interest in or to the lands described in paragraph 8 hereof, and no right to possession thereof.

(Answers to Claim Nos. II and III omitted in printing.)

WHEREFORE, these defendants pray that each and every prayer of plaintiff's complaint be denied, that plaintiff's complaint be dismissed, and that the Court award to these defendants their costs.

COUNTERCLAIM

For their countercliam against the plaintiff these answering defendants allege as follows:

20. This Court has jurisdiction over this counterclaim by reason of Rule 24 (a) and Rule 13 (a) of the Federal Rules of Civil Procedure.

21. These defendants adopt and incorporate herein by this reference the allegations in their foregoing answer to plaintiff's complaint.

WHEREFORE, these defendants pray that judgment be entered as follows:

(a) Setting aside the order of this Court in cases, C 75-4024 and C 75-4026, both now consolidated herewith, granting plaintiff's application for preliminary injunction; dissolving the preliminary injunction heretofore issued by this Court; and granting a preliminary injunction to these defendants herein enjoining and restraining the plaintiff, Omaha Indian Tribe, its individual members, agents, employees, and other persons acting under or by their direction, from interfering with the possession and use of the lands described in paragraph 8 hereof by these answering defendants until the rights of the parties to this action have been finally determined by this Court.

(b) For a judgment quieting title to the land described in paragraph 8 hereof in the defendant, RGP, Inc. in fee simple; declaring that the plaintiff, the Omaha Tribe of Indians, and its members, have no right, title or interest in said described land or any part thereof; and enjoining the plaintiff, its agents, employees, members and other persons acting under their direction, from asserting title to such lands and from interfering in any way with the possession, use and occupacy of said land by defendant, RGP, Inc. and their lessees and assigns.

(c) For such other relief as the Court may find justified and for the costs of this action.

PETERS, CAMPBELL &
PEARSON, P.C.

By /s/ Peter J. Peters

233 Pearl Street
Council Bluffs, Iowa 51501

Attorneys for Defendants RGP, INC. and Otis Peterson

(Proof of service omitted in printing.)

APPENDIX DD

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

BLACKBIRD BEND AREA, et al.,

Defendants.

ANSWER OF DEFENDANTS STATE OF IOWA AND STATE OF IOWA CONSERVATION COMMISSION

DIVISION ONE

CLAIM NO. 1

For an answer to Claim No. 1 of the Complaint, Defendants State of Iowa and State of Iowa Conservation Commission admit, deny and allege as follows:

1. Defendants admit paragraph 1 of the Complaint.

2. Defendants admit that the Omaha Indian Tribe occupied an area of land in the present State of Nebraska, that is exercised and still exercises certain powers of self-government under the laws of the United States, and that it was party to certain agreements with the United States of America, including the agreement referred to in the Complaint as "the Treaty of 1854". Defendants further allege that they lack knowledge or information sufficient to form a belief as to the

remaining allegations of paragraph 2 of the Complaint, and such allegations are therefore denied.

3. Defendants admit that the Treaty of 1854 purports to reserve to the Omaha Indian Tribe certain lands referred to therein, situated in the Territory of Nebraska, and the State of Nebraska was thereafter admitted to the Union. Defendants further allege that they lack knowledge or information sufficient to form a belief as to what if any land, referred to in the Treaty of 1854, was reserved to the Omaha Indian Tribe and was or is occupied by the present Omaha Indian Reservation.

4. Defendants admit that the middle of the main channel of the Missouri River for a period of time was the boundary between the states of Iowa and Nebraska.

5. Defendants admit that the boundary between the states of Iowa and Nebraska was fixed by the Iowa-Nebraska Boundary Compact so that the middle channel of the Missouri River was no longer the boundary between those states in some areas. Defendants deny the remaining allegations of paragraph 5 of the Complaint.

6. Defendants deny the allegations in paragraph 6 of the Complaint.

7. Defendants deny that title to the land referred to in paragraph 7 of the Complaint is in the Omaha Indian Tribe and that it is part of the Omaha Indian Reservation.

8. Defendants admit the Exhibit referred to in paragraph 8 of the Complaint purports to be a map setting forth the Iowa-Nebraska Compact boundary in the vicinity of the Omaha Indian Reservation. Defendants deny the remaining allegations contained in paragraph 8 of the Complaint.

9. Defendants deny the Exhibit referred to in paragraph 9 of the Complaint sets forth the eastern boundary of the Omaha Indian Reservation in the State of Iowa.

10. Defendants deny the Exhibit referred to in paragraph 10 of the Complaint describes the Omaha Indian Reservation within the State of Iowa.

11. Defendants admit they claim right, title and interest in certain land referred to in paragraph 11 of the Complaint. Defendants deny the remaining allegations in paragraph 11 of the Complaint.

12. Defendants deny the allegations in paragraph 12 of the Complaint.

13. Defendants deny the allegations in paragraph 13 of the Complaint.

14. Defendants deny the allegations in paragraph 14 of the Complaint.

(Answer to Claim No. 2 omitted in printing).

(Answer to Claim No. 3 omitted in printing).

DIVISION II

Further answering, Defendants State of Iowa and State of Iowa Conservation Commission allege as follows:

35. Defendant State of Iowa is a sovereign state of the United States, admitted thereto in 1846 under 9 Stat. L. 117, and Defendant State of Iowa Conservation Commission is a lawful agency of the State of Iowa and a part of the government thereof.

36. Part of the land described in the Complaint is within the State of Iowa and owned by the State of Iowa as sovereign.

37. Defendants own the bed of the Mississippi River between the thalweg and the ordinary high water mark and bank on the easterly side of the river, and islands growing up out of that portion of the riverbed and all abandoned channel of that portion of the river.

38. Part of said land is described in Exhibit A, attached hereto, and consists of an island and abandoned river channel lying on the easterly side of the thalweg of the Missouri River and on the easterly side of the compact line entered into between Iowa and Nebraska in 1942 and approved by Congress in 1943, 57 Stat. L. 495.

39. The State of Iowa owns and has the right and title to some of the land described in Exhibit A, attached hereto, by additional reason of quit claim deeds executed to the State of Iowa and filed and recorded in the office of the Monona County Recorder on May 25, 1965, Book 77 Land Deeds page 233, and May 25, 1965, Book 77 Land Deeds page 238, which deeds were executed in settlement of boundaries owned by the State of Iowa as sovereign.

40. Other land claimed by the Plaintiff consists of land belonging to the State of Iowa by virtue of action of the Missouri River, being land between the thalweg and the ordinary high water mark and bank on the easterly side of the river, islands growing up out of that portion of the river bed and abandoned channel of that portion of the river.

41. The western boundary of the State of Iowa was established by the United States Congress in 1943 and rights of the parties to this action were fixed thereby.

DIVISION III

42. Land which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby.

43. Plaintiff and its predecessors abandoned and relinquished their rights, title and possession, if any they had, to the land in question.

44. Plaintiff, its predecessors, agents and representatives did not assert any claim to the land in question until after witnesses having knowledge of the facts material herein died and evidence otherwise available was lost, so that Plaintiff's claim is barred by laches.

DIVISION IV

Counter-Claim

For a counter-claim against the plaintiff the defendants State of Iowa and State of Iowa Conservation Commission allege as follows:

45. This Court has jurisdiction over this counterclaim by reason of Rule 13(a) of the Federal Rules of Civil Procedure.

46. The defendants State of Iowa and State of Iowa Conservation Commission adopt by reference their answers in paragraphs 1 through 44, above, as if fully set forth.

47. An accurate legal description of the land owned by the State of Iowa within the area described in the complaint as Tract I is annexed hereto and marked Exhibit "A".

48. Accurate legal descriptions of the land owned by the State of Iowa within the areas described in the complaint as Tract II and Tract III are annexed hereto and marked Exhibit "B" and Exhibit "C".

WHEREFORE, the defendants State of Iowa and State of Iowa Conservation Commission pray that judgment be entered quieting title to the land described in Exhibit "A", Exhibit "B" and Exhibit "C", annexed hereto, in the defendant State of Iowa in fee simple, declaring that plaintiff and its members have no right, title or interest in said described land, or any part thereof; enjoining the plaintiff and its members from asserting title to such lands and from interfering in any way with the possession, use and occupancy of said lands by the defendants State of Iowa Conservation

Commission, dismissing plaintiff's complaint at plaintiff's costs, and granting such other and further relief as to the Court may seem just.

RICHARD C. TURNER
Attorney General of Iowa

CLIFFORD E. PETERSON
JAMES C. DAVIS
Assistant Attorneys General

/s/ Bennett Cullison, Jr.

P.O. Box 68
Harlan, Iowa 51537
Telephone: (712) 755-2192

Attorneys for Defendants
State of Iowa and State of
Iowa Conservation Commission

(Proof of service omitted in printing).

APPENDIX EE

HAROLD SORENSON, HAROLD M. SORENSON, LUEA SORENSON AND DARRELL L. SORENSON, et al.,

Defendants.

ANSWER AND COUNTERCLAIM

(Filed February 12, 1976)

COME NOW the defendants, Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson and in this their answer to plaintiff's complaint, respectfully states to the Court:

CLAIM NO. I

1. Defendants deny paragraph 1.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, and 4, and therefore deny the same.

3. Defendants admit the first sentence of paragraph 5 but deny the remainder of the paragraph.

4. Defendants deny paragraph 6.

5. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9 and 10, and therefore deny the same.

6. Defendants deny paragraphs 11, 12, 13 and 14.

WHEREFORE, these defendants pray that plaintiff's first claim be dismissed as to these defendants at plaintiff's costs.

(ANSWER TO CLAIM NO. II AND CLAIM NO. III omitted in printing.)

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a cause of action upon which relief can be granted.

2. This court lacks jurisdiction of the subject matter.

3. Plaintiff should be denied relief because its claims are barred by the statute of limitations.

4. Plaintiff should be denied relief because it has acquiesced in the possession and ownership of these defendants in the land which is claimed adversely to these defendants.

5. Plaintiff should be denied relief because it is guilty of laches.

6. Plaintiff should be denied relief because its claims are barred by the doctrine of estoppel.

7. Plaintiff should be denied relief because it has abandoned its claims set out in its complaint.

8. Plaintiff should be denied relief because plaintiff has so long delayed its claim to this land and has not come into the court with clean hands.

9. Plaintiff should be denied relief for the reason that granting the same would deprive these defendants of their property without due process of law, and deny these defendants of equal protection of the laws.

WHEREFORE, these defendants pray that plaintiff's complaint be dismissed in its entirety at plaintiff's costs.

(COUNTERCLAIM I omitted in printing)

COUNTERCLAIM II

COMES NOW the defendant, Harold M. Sorenson, counterclaimant, and states to the court:

1. That at all times material hereto he was and is the owner of certain real estate more particularly described in

Exhibit "Sorenson A" attached hereto and by this reference made a part hereof.

2. That this counterclaimant denies that the plaintiff, or any of the defendants named herein, have any valid right, title, interest or estate in or to any of the above described lands and alleges that any adverse claim of the plaintiff or any of the defendants is illegal, invalid, void and without merit.

3. That your counterclaimant, Harold Sorenson, is entitled to judgment by this court against the plaintiff and against all other defendants, and each of them, declaring, determining, and quieting title in and to the lands above described in this counterclaimant, Harold Sorenson, and denying each and every adverse claim of the plaintiff and all other defendants, and is entitled to judgment and decree continuing and restoring to him full, peaceful and quiet possession of said lands.

WHEREFORE, your counterclaimant, Harold M. Sorenson, prays this court for entry of a judgment in his favor determining, declaring, and quieting title in him to the lands described in this counterclaim, and forever restraining and enjoining the petitioner and all other defendants herein and each of them from claiming or asserting any right, title, interest or estate in and to said lands, and further for the costs of this action.

COUNTERCLAIM III

COME NOW the defendants, Harold Sorenson and Luea Sorenson, husband and wife, counterclaimants, and state to the court:

1. That at all times material hereto they were and are the owners of certain real estate more particularly described in exhibit "Sorenson B" attached hereto and by this reference made a part hereof.

2. That these counterclaimants deny that the plaintiff, or any of the defendants named herein, have any valid right,

title, interest or estate in or to any of the above described lands and allege that any adverse claim of the plaintiff or any of the defendants is illegal, invalid, void and without merit.

3. That these counterclaimants, Harold Sorenson and Luea Sorenson, husband and wife, and entitled to judgment by this court against the plaintiff and against all other defendants and each of them, declaring, determining and quieting title in and to the lands above described in these counterclaimants, Harold Sorenson and Luea Sorenson, husband and wife, and denying each and every adverse claim of plaintiff and all other defendants, and are entitled to judgment and decree continuing and restoring to them full, peaceful and quiet possession of said land.

WHEREFORE, your counterclaimants, Harold Sorenson *and Luea Sorenson, husband and wife, pray this court* for entry of a judgment in their favor determining, declaring and quieting title in them to the land described in this counterclaim, and forever restraining the plaintiff and all other defendants herein, and each of them, from claiming or asserting any right, title, interest or estate in and to said land, and further for the costs of this action.

COUNTERCLAIM IV

COMES NOW the defendant, Darrell L. Sorenson, counterclaimant, and states to the court:

1. That at all times material hereto he was and is the owner of certain real estate more particularly described in exhibited "Sorenson C" attached hereto and by this reference made a part hereof.

2. That this counterclaimant denies that the plaintiff, or any of the defendants named herein, have any valid right, title, interest or estate in or to any of the above described lands and alleges that any adverse claim of the plaintiff or any of the defendants are illegal, invalid, void and without merit.

3. That your counterclaimant, Darrell L. Sorenson, is entitled to judgment by this court against the plaintiff and

against all other defendants, and each of them, declaring, determining, and quieting title in and to the lands above described in this counterclaimant, Darrell L. Sorenson, and denying each and every adverse claim of the plaintiff and all other defendants, and is entitled to judgment and decree continuing and restoring to him full, peaceful and quiet possession of said lands.

WHEREFORE, your counterclaimant, Darrell L. Sorenson, prays this court for entry of a judgment in his favor determining, declaring and quieting title in him to the lands described in this counterclaim, and forever restraining and enjoining the petitioner and all other defendants herein and each of them from claiming or asserting any right, title, interest or estate in and to said lands, and further for the costs of this action.

/s/ Maurice B. Nieland

300 Toy National Bank Building
Sioux City, Iowa 51101

Attorney for Defendants Harold Soreson, Harold M. Sorenson, Luea Sorenson and Darrell L. Soreson

(Certificate of service and Exhibits A, B and C omitted in printing.)

APPENDIX FF

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA

WESTERN DIVISION

OMAHA INDIAN TRIBE, *etc.*,
Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, *et al.*,
Defendants.

No. 75-4067

ORDER

(filed Jan. 26, 1976)

This matter is before the court on the following motion: plantiff's unresisted motion for equitable relief filed October 23, 1975; the resisted motions to dismiss filed by defendant Harold Jackson on November 13, 1975, by defendant Roy Tibbals Wilson on December 1, 1975, and by defendants RGP, Inc. and Otis Peterson on December 8, 1975; the unresisted motion to dismiss filed by defendants State of Iowa and Iowa Conservation Commission on December 22, 1975; the unresisted motion filed January 5, 1976, by defen-dants State of Iowa and Iowa Conservation Commission to withdraw their previous motion to dismiss; the unresisted motions to make more definite and certain filed by defendant Northern Natural Gas Co. on November 10, 1975, by defen-dants Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell Sorenson on December 3, 1975, by defendant Iowa Public Service Co. on December 8, 1975, and by defendant Loyd Fletcher on December 17, 1975; the resisted motion for ingress and egress filed by plaintiff on December 15, 1975; the unresisted motion for approval of costs filed by defendants Harold Sorenson, Harold M. Sorenson, Luea Sorenson, and Darrell L. Sorenson on December 30, 1975; and the resisted motion to consolidate filed by plaintiff on December 31, 1975.

Plaintiff Omaha Indian Tribe (Tribe), and Indian Tribe organized and duly recognized by the Secretary of the Interior pursuant to 25 USC §476, commenced this action to quiet title in approximately 11,300 acres of land on the western border of Iowa. Injunctive relief to prevent interference with peaceful possession and damages for past trespasses upon the disputed lands are also sought. Plaintiff's claims are founded upon a treaty with the United States signed in 1854, and jurisdiction is predicated upon 28 USC §§1331 and 1362.

Motion for Equitable Relief

Plaintiff seeks access to that portion of the disputed lands in the Blackbird Bend Area within the boundaries delimited by the "Barrett Survey of 1867," for purposes of harvesting the 1975 corn crop. The lands for which access is sought are also the subject matter of two pending civil actions in this court, No. C 75-4024, *United States* v. *Roy Tibbals Wilson* (commenced May 19, 1975), and No. C 75-4026, *Omaha Indian Tribe* v. *Harold Jackson* (commenced May 20, 1975). A similar motion was filed in those actions, and upon denial by the court, and arrangement for access to harvest the corn crop was negotiated by the Tribe with an adjacent landowner. The crop having been harvested, the instant motion has become moot.

Motions to Dismiss

Defendants Jackson, Wilson, RGP, Inc., and Peterson in their several motions to dismiss contend that the present suit is a duplicate of those already pending. These defendants also argue that the United States is a real party in interest and an indispensable party whose absence requires dismissal under Rule 19, FRCP. It is the view of the court that these motions are not well taken.

Clearly the case at bar is not a duplicate of cases Nos. C 75-4024 and C 75-4026, the latter involving only a portion of the lands for which title is sought to be quieted in plaintiff

in the present suit. Also, numerous defendants in the instant case are not named in the two previously filed cases, and damages are sought in this action but not in the prior actions.

Defendants cited language from *Heckman* v. *United States*, 224 U.S. 413, 446, 32 S. Ct. 424, 56 L.Ed. 820 (1912), to the effect that individual Indian allottees could not bring an identical action to cancel allegedly invalid conveyances of land once such an action had been brought by the United States in its capacity as guardian of the Indian tribes is an accurate statement of the law, but inapplicable here because there is no identical prior action pending as indicated above.[1] The Court in *Heckman* expressly recognized the right of an individual Indian to maintain his own action to protect his property interests, whether or not aided by the United States. 224 U.S. at 446. *Accord*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 368-372, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968); *Captain Grande Bank of Mission Indians* v. *Helix Irrigation District*, 514 F.2d 465, 470 (9th Cir. 1975).

Similarly, a recognized Indian Tribe may sue in its own right in federal district court to protect its interests in land where the interests are derived from treaties with the United States. *Fort Mojave Tribe* v. *Lafollete*, 478 F.2d 1016, 1017 (9th Cir. 1973). *See Oneida Indian Nation* v. *Oneida County*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

Though the United States has a governmental interest in protecting the title of lands held in trust for an Indian tribe, *Heckman, supra* at 437-438, which thereby renders it a real party in interest in a quiet title action involving such lands, *United States* v. *Minnesota*, 270 U.S. 181, 194, 46 S.Ct. 298, 70 L.Ed. 539 (1926), that categorization is not synonymous with being an "indispensable party" under Rule 19, FRCP. *Reliance Ins. Co.* v. *Wisconsin Natural Gas Co.*, 60 F.R.D. 429, 431 (E.D. Wis. 1973). In suits brought by Indian Tribes to establish or maintain their legal or equitable title to lands,

[1] Insofar as the "Barrett Survey" portion of the Blackbird Bend area is the subject matter of all three lawsuits, multiple and inconsistent obligations can be prevented by further order of court at the appropriate time, and the court's decision with respect to plaintiff's motion for consolidation should obviate any possibility of such a result.

the United States need not be joined as an indispensable party.[2] *Fort Mojave Tribe*, *supra* at 1017; *Skokomish Indian Tribe* v. *France*, 269 F.2d 555, 560 (9th Cir. 1959); *Choctaw and Chicasaw Nations* v. *Seitz*, 193 F.2d 456, 458-460 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952).

The State of Iowa and Iowa Conservation Commission move to withdraw a previously filed motion to dismiss, conceding that the motion to dismiss was not well founded. The court agrees with the latter conclusion, and the motion to withdraw will be granted.

Motions to Make More Definite and Certain

Several defendants move for an order directing plaintiff to file a more definite statement of certain matters in the complaint. In particular, it is argued that plaintiff should set forth the specific interests claimed to be asserted in the disputed lands by each defendant, and should further outline the theory by which it is contended that these lands now in Iowa remain a part of the Omaha Indian Reservation, which was originally created in Nebraska.

Motions for more definite statement pursuant to Rule 12 (e), FRCP, are not given a broad scope in federal practice because they may serve as a dilatory tactic and improperly shift matters to the pleading stage which are more appropriately dealt with in discovery. *E.g.*, *Nixa* v. *Hays*, 55 F.R.D. 40 (E.D. Wis. 1972); *Blue Diamond Coal Co.* v. *United Mine Workers*, 282 F. Supp. 562 (E.D. Tenn. 1968); *Webb* v. *Webb*, 32 F.R.D. 615 (W.D. Mo. 1963). The current rules of pleading require only that plaintiff provide sufficient notice of the nature of the claim to enable the defendants to prepare a responsive pleading. *Nixa* v. *Hayes*, *Garza* v. *Chicago Health Clubs, Inc.*, 329 F. Supp. 936 (N.D. Ill. 1971); *Fairmont Foods Co.* v. *Manganello*, 301 F.Supp. 832 (S.D. N.Y.

[2] In the converse suit, a quiet title action by an individual against an Indian Tribe, the United States is an indispensable party defendant. *Fontanelle* v. *Omaha Tribe of Nebraska*, 430 F.2d 143, 145-146 (8th Cir. 1970); *Choctaw and Chicasaw Nations* v. *Seitz*, 193 F.2d 456, 460 (10th Cir. 1951).

1969). The complaint here is sufficient under that standard, and indeed several defendants have drafted and filed their answers.

Motion to Consolidate

Plaintiff moves to consolidate that portion of the instant case which relates to Tract I, the Blackbird Bend area, with cases Nos. C 75-4024 and C 75-4026. It is further requested that the remainder of this case be severed for trial at a later date. A large number of defendants object to any consolidation, or alternatively to the partial consolidation requested by plaintiff.

Rule 42(a), FRCP, permits consolidation of two or more actions which present a common issue of law or fact, and the trial court has broad discretion to grant a consolidation as a matter of convenience and economy in administration. *Thomas* v. *Deason*, 317 F.Supp. 1098 (W.D. Ky. 1970); *Stein, Hall & Co.* v. *Scindia Steam Nagivation Co.*, 264 F.Supp. 499 (S.D.N.Y. 1967). These cases involve common issues of fact and law concerning the shifts in location of the Missouri River and concomitant effects on the riparian lands, and the same expert witnesses will likely provide testimony relevant to all the parcels of land included in these actions. It is the view of the court that considerations of judicial economy which favor simultaneous resolution of claims arising from a common fact situation predominate here when balanced against any claim of delay or inconvenience, and the cases should be consolidated in their entirety. *See Ikerd* v. *Lapworth*, 435 F.2d 197 (7th Cir. 1970); *Madigan, Inc.* v. *Goodman*, 57 F.R.D. 512 (N.D. Ill. 1972); *Stein, Hall, supra*; *Alabama Vermiculite Corp.* v. *Patterson*, 149 F.Supp. 534 (W.D. S.C. 1955).

Motion for Ingress and Egress

Plaintiff Tribe moves the court to grant interlocutory equitable relief in the form of an access easement impressed on the lands of certain defendants in order to provide a ready means of ingress and egress for the Tribe to the area within

the Barrett Survey. As noted above, the court previously denied such relief in cases Nos. C 75-4024 and C 75-4026, primarily for lack of jurisdiction over the subject *res*. The instant action has brought the lands which would be servient to the requested easement within the jurisdiction of the court. However, the parties have previously negotiated access arrangements, and the court is hopeful that such an arrangement can be agreed upon for the upcoming crop year. Ruling on this motion will therefore be reserved at the present time.

Motion for Approval of Costs

Defendants Harold Sorenson, Harold M. Sorenson, Luea Sorenson and Darrell L. Sorenson move the court to approve certain expenditures as necessary expenses to be taxed as costs in the event they are successful in defending this lawsuit. The allowance of costs is a matter of discretion with the trial court, *Linneman Construction, Inc. v. Montana-Dakota Utilities Co.*, 504 F .2d 1365 (8th Cir. 1974), and the court has power to allow as costs in an equitable action the reasonable expenses incurred in preparing evidentiary items to be introduced in the case. *W.F. & John Barnes Co. v. International Harvester Co.*, 145 F .2d 915 (7th Cir. 1944); *Sperry Rand Corp. v. A-T-O, Inc.*, 58 F.R.D. 132 (E.D. Va. 1973); *Lanier v. Terminal Ry.*, 47 F.R.D. 68 (S.D. Ala. 1969).

Defendants wish to obtain authorization prior to trial to tax as costs in the event of a favorable outcome the reasonable expenses incurred in preparation of an abstract and its continuance, surveys, maps, plats, charts, models and photographs. While prior court approval is the preffered method of preventing abuses in incurring unreasonable expenses sought to be taxed as costs, *Johns-Manville Corp. v. Cement Asbestos Products Co.*, 428 F .2d 1381 (5th Cir. 1970); *H.C. Baxter & Bros. v. Great Atlantic & Pacific Tea Co.*, 44 F.R.D. 49 (S.D. Me. 1968), it is the court's view that approval should be granted at the present time only for the cost of obtaining an abstract and preparing its continuance. Upon a further showing that other particular items from the list set forth by defendants are necessary for a proper determination of the

issues, approval may also be granted at that time for such a specifically described item. *See Lanier, supra* at 71. Ruling will thus be reserved on the remainder of the motion.

It is therefore

ORDERED

1. Motion for equitable relief denied.

2. Motions to dismiss denied.

3. Motion to withdraw previous motion to dismiss granted.

4. Motions to make more definite and certain denied.

5. This case and cases Nos. C 75-4024, *United States v. Roy Tibbals Wilson*, and C 75-4026, *Omaha Indian Tribe v. Harold Jackson*, are hereby consolidated.

6. Ruling on motion for ingress and egress reserved.

7. Motion for approval of costs granted as to cost of preparing an abstract and its continuance, and ruling reserved on remainder of motion.

8. Defendants Herbert Nelson Benjamin, Maurice Louis Benjamin, Helen Bentley, Vasco Boulden, Cleo Cox, Ruth Craford, Gladys Durr, Lloyd Fletcher, Alma Schmidt Henderson, American Telephone and Telegraph Company, Bertha Kirk, Harriet Kir, Mary Ann Kiskadon, John H. Lund, Ruth J. Lund, Ethel McCoy, Monona County Rural Electric Cooperative, Arthur Orr, Robert Orr, Otis Peterson, Anena Ruth, George C. Ruth, Richard A. Ruth, Jean M. Ruth, Fred Sanders, Fred E. Sanders, Rosalie Sanders, Ferd Stangel Ariel Virtue, W.W. Virtue, Willaday Farms, Inc., Ross O. Willey, Vincent R. Willey, Karen Anderson, Richard L. Anderson, Eva Carlson, Mildred Orr Carter, Hazel Clar, Chris Christensen, Barbara Dahl, Clara Grace Dahl, Gordon Dahl, Doris Dufrene, Harold B. Dufrene, Myrva Everett, R.J. Everett, Lloyd P. Fender, Verna Peral Fender, J.B. Hicks, Substitute Trustee for Mildred C. Hicks, Ramona Orr Huff, Henry L. Jester, James Kent, Carroll Koenig, Lorraine Kutzler, Alice

Parker, Nadine Parker, Wallace G. Parker, Carol Ann Reitan, Robert E. Reitan, Lillian C. Rupp, Roy R. Rupp, Don E. Ruth, Joyce M. Ruth, Don E. & Joyce M. Ruth (commercial), Edna J. Sponder, Roy T. Sorenson, Wilbur L. Stokely, Ral L. Grosvenor, Hazel I. Jacobson, Joan S. Jacobson, William S. Jacobson, Minnie Marble, Coy W. McFarland, Ruby McFarland, Fred E. Nelson, Gladys E. Nelson, Carolyn Ann Nelson, Larry L. Nelson, Larry M. Olsen, Leland M. Olson, John M. Ropes, Clyde H. Rush, Glen Swan, Grace Swan, and Ethel Swan shall have to and including.

Friday, January 30, 1976 to move or plead in this action.

EDWARD J. MCMANUS

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

January 23, 1976.

APPENDIX GG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, *et al.*,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, *etc.*,

Plaintiff,

vs.

HAROLD JACKSON, *et al.*,

Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, *etc.*,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, *et al.*,

Defendants.

ORDER

(Filed April 5, 1976)

This matter is before the court on the following motions:

(Listing and discussion of a number of categories of motions omitted in printing.)

MOTIONS TO DISMISS

Numerous defendants in No. C 75-4067 move to dismiss on the ground that no claim is stated because it appears upon the face of the complaint that all claims alleged are barred by the pertinent Iowa statue of limitations, § 614.1(5), Code of Iowa (1975). It is the court's view that the motion is not well taken.

Even assuming Iowa law to be applicable on this issue, the Iowa high court has consistently held that the doctrine of adverse possession as governed by the statute does not effect a change of title against governmental bodies so as to prevent the exercise of their governmental functions. *E.g., Twining v. City of Burlington,* 68 Iowa 284, 27 N.W. 243 (1886); *Johnson v. City of Shenandoah,* 153 Iowa 493, 133 N.W. 761 (1911); *Sioux City v. Betz,* 232 Iowa 84, 4 N.W.2d 872 (1942). Here the United States is a named party in one action and has a governmental interest in protecting the title of all lands held in trust for an Indian tribe pursuant to treaty. *See Heckman v. United States,* 224 U.S. 413, 437-438, 32 S.Ct. 424, 56 L. Ed. 820 (1912).

Furthermore, plenary control over tribal rights to Indian lands became the exclusive province of Federal law upon adoption of the Constitution. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974). The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified at 25 USC § 177.

The latter statute provides *inter alia:*

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.

If title to tribal lands is not alienable by the Indians, *a fortiori* title cannot be obtained against them by adverse possession. *United States v. Schwartz,* 460 F.2d 1365, 1371-1372 (7th

Cir. 1972); *United States v. 7,405.3 Acres of Land,* 97 F.2d 417, 422-423 (4th Cir. 1938).

Initially, the court finds that the interests of judicial convenience and economy are not being served by consolidation of these three cases *in toto.* The posture of No. C 75-4067 is hindering an orderly and efficient administration of justice in the other two cases, wherein the parties, issues and boundaries of the controverted lands are more clearly in focus. Therefore, trial of all issues relating to lands in No. C 75-4067 which are not also within the subject res of Nos. C 75-4024 and C 75-4026, and all issues of damages, will be severed. Cases Nos. C 75-4024 and C 75-4026 will remain consolidated with each other and with the portion of No. C 75-4067 relating to the identical subject res.

Ruling on the motion to strike jury trial demand will be reserved with respect to the severed portion of No. C 75-4067. The other two cases, and the quiet title issues in No. C 75-4067 relating to the identical lands in the Blackbird Bend region, are equitable in nature. The Tribe has possession of these lands.[2] An action to quiet title and obtain injunctive relief by a party in possession is equitable, for which trial is not required. *Humble Oil & Refining Co. v. Sun Oil Co., 191* F.2d 705, 718 (5th Cir. 1951), *cert. denied,* 342 U.S. 920, 72 S. Ct. 367, 96 L. Ed. 687.; *United States v. Mulligan,* 177 F. Supp. 384, 386 (D. Ore. 1959); *cf. Zunamon v. Brown,* 418 F.2d 883, 887-889 (8th Cir. 1969). Plaintiffs' motions to strike jury trial demand will be granted with respect to these consolidated cases:

Motion for Partial Summary Judgment

Plaintiff Tribe moves for summary judgment on several issues raised by way of affirmative defenses in the answers of certain defendants. Summary judgment is appropriate only where no genuine issues of material fact remain unresolved

[2] In its ruling on the motion for preliminary injunction, the court resolved the issue of the status quo by ruling that the Indians were then in possession under a claim of title.

and the movant is clearly entitled to judgment as a matter of law. Rule 56, FRCP; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944); *Chicago & Northwestern Ry. Co. v. Hospers Packing Co., Inc.*, 363 F. Supp. 697 (N.D. Ia. 1973). Here defendants have failed to file any resistance generating factual issues as required by Rule 56(e), FRCP, and it appears that the issues remaining on these defenses are largely questions of law.

The court has previously indicated that it has subject matter jurisdiction over these actions, 28 USC §§ 1331, 1345, 1362, and plaintiffs' motion is granted on this issue. It is also the court's view that the complaints do state a cause of action, and the motion will also be granted on this issue.

With respect to those issues listed in subparagraphs c-h, summary judgment is appropriate as a matter of law only with respect to the establishment of title aspects and not on the damages issues. As stated above, state statues of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action. *United States v. Schwarz, supra* at 1372. Summary judgment will be granted to the extent indicated above, and denied in all remaining respects.

April 5, 1976.

/s/ Edward J. McManus, Chief Judge
United States District Court

APPENDIX HH

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROY TIBBALS WILSON, *et al.*,
Defendants.

NO. C 75-4024

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, *et al.*,
Defendants.

NO. C 75-4026

OMAHA INDIAN TRIBE, *et al.*,
Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

NO. C 75-4067

MOTION BY OMAHA INDIAN TRIBE FOR A PROTECTIVE ORDER AGAINST THE JUSTICE DEPARTMENT IN THE TRIBE'S PRESENTATION AND PROSECUTION OF CASES CIV. NO. 4026 AND 4067

COMES NOW the Omaha Indian Tribe Plaintiff in Civ. No. 75-4026 and Civ. No. 75-4067 and refers to its "Application" dated June 3, 1975 to have dismissed or held in abeyance the case initiated by the Justice Department Civ. No. 75-4024 and

the Tribe renews with this court its long standing objection to the case Civ. No. 75-4024 which case was initiated by the Justice Department over the vigorous opposition of the Omaha Indian Tribe and further asserts that since the aforesaid June 3, 1975 filing by the Tribe the conduct of the Justice Department is now and has been contrary to the best interests of the Omaha Indian Tribe, it being respectfully submitted that the case Civ. No. 75-4024 as filed by the Justice Department is a haphazard, truncated case, filed at the insistance of the defendants and that Civ. No. 75-4024 in its present form and posture falls far short of asserting the proper and full claims of the Omaha Indian Tribe and Civ. No. 75-4024 is now and at all times has been considered by the Omaha Indian Tribe frivolous in character and a grave threat to the interests of the Omaha Indian Tribe and the trial of the case Civ. No. 75-4024 in its present form and posture constitutes a continuing threat of irreparable damage to the Omaha Indian Tribe and could very well prevent an effective presentation and prosecution of its cases Civ. No. 75-4026 and Civ. No. 75-4067.

NOW THEREFORE THE OMAHA INDIAN TRIBE respectfully prays this court for a protective order which will:

1. Completely separate the cases Civ. No. 75-4026 and Civ. No. 75-4067 of the Omaha Indian Tribe from the Justice Department case Civ. No. 75-4024 and preclude any effort on the part of the Justice Department to represent the Omaha Indian Tribe and that the Omaha Indian Tribe will not be bound by any of the activities of the Justice Department in the trial of its case Civ. No. 75-4024 and that the Omaha Indian Tribe will not be bound by the activities of the Justice Department including but not limited to the settlement of the case.

2. Permit the evidence to be offered by the Omaha Indian Tribe in support of its claims in Civ. No. 75-4026 and Civ. No. 75-4067 will be entirely independent of the Justice Department and that the Tribes' exhibits, witnesses and all of its activities in the presentation of its claims will be seperate and independent from the case civ. No. 75-4024.

3. Authorize the Omaha Indian Tribe to cross examine all of the witnesses who testify on behalf of the Justice Department in Civ. No. 75-4024 and to object to any and all evidence both oral and documentary which the Justice Department may offer in the case and will have the right to offer evidence in rebuttal of any and all of the evidence offered by the Justice Department in Civ. No. 75-4024 and in all other respects to proceed in the trial on the merits in the consolidated cases to the end that the Omaha Indian Tribe will be in a position properly and independently to present its cases in Civ. No. 75-4026 and Civ. No. 75-4067 and to be free from embarrassment and damage by the Justice Department in Civ. No. 75-4024.

Respectfully submitted,

O'BRIEN, CALVIN & O'BRIEN

By: _____

John T. O'Brien
916 Grandview Blvd.
Sioux City, Iowa 51101

_____

William H. Veeder
4808 W. Braddock Rd.
Alexandria, Virginia 22311

Attorneys for Plaintiff

APPROVED:

_____

Edward L. Cline—Chairman
Omaha Tribal Council

RESOLUTION OF THE OMAHA INDIAN TRIBE OF NEBRASKA

RESOLUTION NO. 76-84

WHEREAS, The Omaha Indian Tribe Plaintiff in Civil No. 75-4026 and Civil No. 75-4067 filed with this Court on June 3, 1975 an "Application" dated June 3, 1975 requesting this Court "To Dismiss or Hold In Abeyance" the Case Civil No. 75-4024 which case had been initiated by the Justice Department *purportedly on behalf of the Omaha Indian Tribe* but in truth and fact Civil No. 75-4024 was initiated by the Department of Justice at the behest of and for the benefit of the powerful Defendants who insisted that the suit be brought; and,

WHEREAS, it was recited in the "Application" of the Tribe the urgent demand of the Omaha Indian Tribe that the Department of Justice be precluded from attempting to represent the Omaha Indian Tribe in regard to the invaluable lands which are the subject matter of these consolidated cases; and,

WHEREAS, on repeated occasions the Omaha Indian Tribe petitioned the Justice Department properly to redraft the complaint in Civil No. 4024 and to set forth full and proper claims of the Omaha Indian Tribe; and,

WHEREAS, the Justice Department has adamantly refused even to discuss with the Tribe the greatly needed revision in the truncated and narrow Civil No. 75-4024; and,

WHEREAS, there was attached to and made a part of the aforesaid "Application" a copy of a resolution dated May 28, 1975 of the Omaha Indian Tribe #75-40 which set forth with great clarity the charges directed by the Omaha Indian Tribe against the Justice Department (a copy of that resolution is attached to and made a part of this resolution) and

this Court is respectfully requested to consider the charges made therein by the Omaha Indian Tribe against the Justice Department which unquestionably will cause irreparable damage to the Omaha Indian Tribe if the Justice Department proceeds to represent the Tribe; and,

WHEREAS, since the filing of the aforesaid "Application" by the Omaha Indian Tribe there has been an increasing amount of information which clearly buttresses the charges that the Justice Department is not acting for the best interests of the Omaha Indian Tribe and that it refuses and continues to refuse to assert appropriate claims for the Omaha Indian Tribe in these cases; and,

WHEREAS, the Omaha Indian Tribe is informed and believes and therefore asserts that Evan Hultman then Attorney General for the State of Iowa disclaimed for the State of Iowa the identical land claimed by the Omaha Indian Tribe to the principal defendant Charles E. Lakin in a state court case and now as United States Attorney purports to represent the Omaha Indian Tribe in Civil No. 75-4024 a clear cut conflict of interest.

NOW, THEREFORE, BE IT RESOLVED, that there be filed with this Court in these consolidated cases a declaration that;

a. The Omaha Indian Tribe be permitted to proceed to trial in these cases totally independent of and free from any control by the Justice Department and that no actions taken by the Justice Department which will in any way be binding upon the Omaha Indian Tribe;

b. The records, exhibits, witnesses and all related matters which are used in the Case Civil No. 4024 be totally separate and distinct from the record, exhibits, witnesses and related matters in the Cases Civil No. 75-4026 and 4067 of the Omaha Indian Tribe and that the Omaha Indian Tribe will not be bound by the actions of the Justice Department.

c. The Omaha Indian Tribe reserves the right to cross examine any and all of the Justice Department witnesses and to object to any and all of the exhibits which the Justice Department may offer and to offer oral and documentary evidence in rebuttal to any of the evidence introduced by the Justice Department in Civil No. 75-4024.

CERTIFICATION

This is to certify that the foregoing resolution was considered at a meeting of the Omaha Tribal Council of the Omaha Tribe of Nebraska, duly called and held on the 2nd day of September, 1976 and was adopted by a vote of 4 for, 0 against, and 1 not voting or absent. A quorum of five was present with the Chairman not voting.

DATED THIS 2ND DAY OF SEPTEMBER, 1976.

HERBERT BLACKBIRD
For—Wilson Wolf, Sr.—
Secretary
Omaha Tribal Council

ATTEST:

EDWARD L. CLINE
Edward L. Cline—Chairman
Omaha Tribal Council

MARGARET HUMPHREY
Acting Superintendent—
Winnebago Agency

RESOLUTION
OF THE
OMAHA TRIBE OF NEBRASKA

RESOLUTION NO. 75-40

WHEREAS, The Omaha Indian Tribe of Nebraska is a Federal Corporation under the Act of June 28, 1934 (48 Stat. 984), as amended, and,

WHEREAS, The Omaha Tribal Council, by its Resolution #75-31, charged the Department of the Interior and the Department of Justice with indulging in gross double dealings, manipulation and abuses, with the result that the two principle agents of the United States of America, the Secretary of the Interior and the Attorney General, failed to fulfill the trust responsibility, and,

WHEREAS, Resolution #75-31 was incorporated into and made a part of the complaint in case #C-75-4026, *Omaha Indian Tribe, Plaintiff, v. Harold Jackson, et al, Defendants,*

WHEREAS, The Department of Justice at the trial held May 28, 1975, did in fact totally abandon the Omaha Tribe in case #C-75-4024, *United States of America v. Roy Tibbals Wilson, et al,* filed May 19, 1975, by failing fully to present the fact that the United States of America, acting by and through the Bureau of Indian Affairs, in fulfillment of its trust obligation, went into possession of the Blackbird Bend area, and did not otherwise effectively present the facts, and in the opinion of observers of the Tribe, left the Courthouse without examining affidavits, exhibits or other data filed by the defendants in support of their claims, and did not take reasonable action to insure the Tribe the right to interpose exceptions or objections to the affidavits or the evidence, and,

WHEREAS, This gross failure to properly or professionally perform the obligation of a lawyer or that of an Agent of the Trustee.

NOW, THEREFORE, BE IT RESOLVED, that the Presiding Judge, Edward McManus, refrain from taking any action in the case #C-75-4024 by reason of the fact that the Omaha Indian Tribe, having been grossly and completely abandoned by the Department of Justice in the aforesaid case, and that the Omaha Indian Tribe fully believes it has been denied its day in court by the Department of Justice which resulted in no opportunity to cross or test the probativity of the evidence, the credibility, the relevancy and the competency of all of the evidence offered by unchallenged affidavits or offers of evidence, and it is understood by the Tribe there was permitted to be offered in evidence certain data which had been totally rejected by the Bureau of Indian Affairs as being non-evidentiary in character and otherwise being objectionable, and,

BE IT FURTHER RESOLVED, that the Court vacate the proceedings of the May 28, 1975 trial, case #C-75-4024, and otherwise vacate those proceedings due to the gross failure of the Department of Justice to properly represent the Tribe effectively, and to, in effect, possibly deny an appeal by the Tribe, and further effectively deny the jurisdiction of the appellate courts, including the Supreme Court, all to the irreparable damage of the Omaha Tribe, in violation of the trust obligation of the United States of America, and

BE IT FURTHER RESOLVED, that this Resolution be filed in the above referred to case, *United States of America v. Roy Tibbals Wilson*, et al, #C-75-4024, and that the Court be prayed to grant

relief to the Omaha Tribe from the record of that case, and that appropriate action be taken by the Court to dismiss or hold in abeyance *United States of America v. Roy Tibbals Wilson, et al,* and grant the relief prayed for in the case of the *Omaha Indian Tribe, Plaintiff, v. Harold Jackson, et al,* #C-75-4026, and to take such other and further action as to entitle to preserve the rights of the Omaha Indian Tribe to full and adequate representation in the case, rather than being grossly abandoned by the Department of Justice as was done on May 28, 1975, in the above mentioned trial, all as described above, and,

BE IT FURTHER RESOLVED, that the Court be advised in case #C-75-4024 that at all times the Omaha Indian Tribe opposed the case #C-75-4024 and that the Omaha Indian Tribe has never waived immunity of suit by the initiation of this unwanted lawsuit by the Department of Justice.

CERTIFICATION

This is to certify that the foregoing Resolution was considered at a meeting of the Omaha Tribal Council of the Omaha Indian Tribe of Nebraska, duly called and held on the 28th day of May, 1975, and was adopted by a vote of four (4) for and one (1) not voting. A quorum of five (5) was present.

Dated this 28th day of May, 1975.

EDWARD L. CLINE

EDWARD L. CLINE,
Chairman,
Omaha Tribe

WILSON WOLF

WILSON WOLF,
Secretary,
Omaha Tribe

LAWRENCE GILPIN

LAWRENCE GILPIN,
Treasurer,
Omaha Tribe

APPROVED:

RICHARD ROMERO,

RICHARD ROMERO,
SUPERINTENDENT
Winnebago Agency.

APPENDIX II

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROY TIBBALS WILSON, et al.,
Defendants.

No. C 75-4024

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to Act of June 18, 1934 (48 Stat. 984) as amended,
Plaintiff,

v.

HAROLD JACKSON, and OTIS PETERSON and the DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,
Defendants.

ORDER

No. C 75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiffs,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY., et al.,
Defendants.

No. C 75-4067

The Court having received a motion filed September 3, 1976, by the Omaha Indian Tribe for protective order against the United States of America, and the Court having further received a motion filed September 23, 1976, by the Omaha Indian Tribe to offer its evidence first and realign the United

States of America as an adversary in the consolidated trial, and the Court having fully considered these motions,

IT IS HEREBY ORDERED that the motion by the Omaha Indian Tribe for protective order against the United States of America be, and hereby is, denied. The consolidated trial will remain consolidated, although each of the Plaintiffs will be permitted to offer its evidence separately and independently. Neither of the Plaintiffs will be permitted to cross examine the other Plaintiff's witnesses.

IT IS FURTHER ORDERED that the motion of the Omaha Indian Tribe to offer its evidence before that of the United States of America, and to realign the two Plaintiffs as adversaries so that the Tribe may object to the Government's evidence and cross examine Government witnesses and offer rebuttal evidence to that of the Government's, be, and hereby is, disposed of in the following manner:

1. Granted in part. The Omaha Indian Tribe will be expected to offer its evidence first in the consolidated trial.

2. Denied in part. The Omaha Indian Tribe will not be permitted to object to Government evidence, cross examine Government witnesses, or offer evidence in rebuttal to Government evidence.

Dated this 26th day of October, 1976.

BY THE COURT:

_____

United States District Judge

ATTEST:

_____

Clerk

By _____

Deputy

APPENDIX JJ
[November 15, 1976]

of this case?

MR. VEEDER: It is a two year contract. I have other cases, Counselor, if you are interested in that.

MR. PETERS: I'm just trying to find out when you get done with your work for the Tribe, do you flop back over to Interior?

MR. VEEDER: I never flop, Counsel. I may go back two years from now. But, the contract runs for two years at least.

THE COURT: So, you will probably go back?

MR. VEEDER: I have no idea. But, I'm out of Interior.

THE COURT: At your election you could go back, I assume?

MR. VEEDER: Possibly, yes.

THE COURT: It may be a distinction without a difference.

MR. PETERS: Well, I guess I get into the hat problem.

THE COURT: Now, we've had a waiver as far as Justice. But, I think to that—I'm going to reverse my decision and I'm going to allow cross-examination. I think that we must, now, in view of these new developments that, I guess, I was not totally aware of. I'm going to allow cross-examination by Mr. Veeder of the witness.

MR. CLEAR: I have no problem with that.

MR. VEEDER: Then, I can pursue objections?

APPENDIX KK

"MOTION AND OBJECTION TO THE INTRODUCTION OF EVIDENCE BY THE JUSTICE DEPARTMENT IN THESE CONSOLIDATED CASES

"COMES NOW the Omaha Indian Tribe, real party plaintiff in these consolidated cases, refers to this Courts orders dated October 28 and October 29, 1976 and respectfully presents the following averments and allegations:

1. This Court by its order dated October 29, 1976 declared that '(1) The Omaha Indian Tribe shall present its case in its entirety.'

2. In presenting its case in its entirety all as provided by this Courts' order of October 29, 1976 the Omaha Indian Tribe has as of the date of the filing of this motion introduced most comprehensive expert proof together with numerous exhibits pertaining to these physical sciences:

(i) Cadastral engineering;

(ii) *Morphology of the Missouri River as it pertains* to the factual issues of these consolidated cases;

(iii) Geology;

(iv) Hydrology;

(v) *Dendorchronology*.

"By that proof the Omaha Indian Tribe respectfully asserts that it has fulfilled whatever burden it may have had in the light of 25 USC 194, the presumptions favoring the Tribe and the affirmative defenses asserted by defendants.

"3. Predicated upon that comprehensive proof of its right, title and interest in and to the 1867 Barrett Blackbird Bend Area the Omaha Indian Tribe respectfully refers to these aspects of the orders entered October 28 and 29, 1976 by this Honorable Court:

"By its order entered October 29, 1976 the Department of Justice, following the Tribes evidence:

" ' * * * shall present its case in its entirety * * * '. That phase of the order is subject, nevertheless, to the provision that the Justice Department will ' * * * avoid * * * where it is reasonably possible to do so * * * ' from offering evidence that is cumulative or duplicative of the evidence offered by the Omaha Indian Tribe in proving its case.

"4. To the extent that the Omaha Indian Tribe has had made available to it by the Justice Department the evidence the Justice Department proposes to offer in these cases these facts are abundantly manifest:

> "Whatever evidence that the Justice Department may offer is of necessity repetitive, cumulative and duplicative of the Tribes' evidence which is now in the record of these cases.

"5. The Omaha Indian Tribe is, moreover, most apprehensive of the course of conduct which the Justice Department will pursue in the trial of its case. That apprehension is predicated upon the repeated failure of the Justice Department properly to represent the Tribe in these cases and the abandonment of the Tribe in the proceedings for the preliminary injunction which gave rise to the June 5, 1975 order of this Court, pursuant to which the Tribe is now in possession of the Blackbird Bend Area. Not only is the Tribe most apprehensive of the conduct of the Justice Department but the failure of the Justice Department to name as party defendants those who are indispensable to the relief required for the Tribe in these cases. The Tribe is moreover most dubious of the quality of the evidence and the capacity of the witnesses to be called by the Justice Department.

"6. The Omaha Indian Tribe is informed and believes that the Justice Department intends to offer in evidence a map of the 1912 Northerly High Bank as the term is used in these cases. That map was rejected by the Omaha Indian Tribe. There is a want of proper foundation for the map and its authenticity is denied. That map appears moreover to have been 'doctored' in furtherance of a claim made at some earlier date under circumstances unknown to the Tribe. Irreparable damage to the Omaha Indian Tribe may well

ensue if that map is offered in evidence by the Justice Department in these consolidated cases.

"7. *In the light of the grave threat of irreparable damage* to the Omaha Indian Tribe and its apprehension as to the course of conduct which will be adhered to by the Justice Department, the threat of irreparable damage is greatly enhance by the provisions contained in this Court order entered October 28, 1976 which among other things provide that the Omaha Indian Tribe:

a. May not object to the evidence offered by the Justice Department;

b. may not cross examine the Justice Department witnesses;

c. May not offer evidence in rebuttal to the evidence offered by the Justice Department.

"It is respectfully submitted that the Omaha Indian Tribe due to the limitations set forth above is powerless to protect itself against the conduct of the Justice Department which has consistently acted contrary to the desires of the Tribe and to the best interest of the Tribe in these consolidated cases.

"DENIAL BY THE JUSTICE DEPARTMENT OF THE OMAHA INDIAN TRIBE'S CONSTITUTIONAL AND CIVIL RIGHT TO BE REPRESENTED IN LITIGATION BY COUNSEL OF ITS OWN CHOOSING

"8. Few precepts of ancient and modern law are more precious than the right of a litigant to be represented by counsel of its own choosing. There is a clear violation of that precept by the appearance of the Justice Department in these cases purporting to represent the Omaha Indian Tribe. Repeatedly as the record in these cases demonstrate the Tribe has objected to the Justice Department. It requested the Justice Department not to initiate Civ. No. 75-4024. The Omaha Indian Tribe later attempted to avoid being represented by the Justice Department by bringing its own case

Civ. No. 75-4067. The Tribe has requested the Justice Department to withdraw from the case. It has otherwise petitioned the Justice Department to refrain from representing the Omaha Indian Tribe. Irrespective of those facts the Justice Department continues to insist that it will proceed with the case and to offer evidence contrary to the desires and wishes of the Omaha Indian Tribe.

"9. History of these cases is replete as to why the Justice Department has been rejected by the Omaha Indian Tribe and continues to be rejected by it and why the Omaha Indian Tribe has petitioned this Court to align the Department of Justice as an adversary party and to otherwise provide protective orders which would prevent the Omaha Indian Tribe from experiencing further irreparable damage by the conduct of the Justice Department. There follows a brief review of the failure of the Justice Department to provide for the Omaha Indian Tribe adequate representation.

"Failure of the Justice Department to Name Parties in Civ. No. 75-4024 Which Are Indispensable to an Effective Decree Quieting Title to the 1867 Barrett Blackbird Bend Area.

"10. Although the Justice Department knew or most assuredly should have known that Harold M. Sorenson and Luea Sorenson claimed adversely to the Omaha Indian Tribe, a very substantial tract of land, and controlled the vital access to the aforesaid 1867 Barrett Blackbird Bend Area, the Justice Department nevertheless failed to name the Sorensons as defendant in Civ. No. 75-4024. Although the Justice Department has for over a year been repeatedly advised of the imperative necessity of naming the Sorensons defendants in Civ. No. 75-4024 the Department has adamantly and continues adamantly to refuse to add the Sorensons as parties defendant.

"11. Although the Department of Justice knew or most assuredly should have known that Monona County, Iowa was claiming the right to levee taxes, title of rights-of-way over county roads and had repeatedly asserted its authority and had exercised the claimed authority on numerous occasions

both as to civil and criminal jurisdiction within the 1867 Barrett Blackbird Bend Area lands of the Omaha Indian Reservation, the Department of Justice failed and continues to fail to name the County of Monona party defendants in its ill conceive Civ. No. 75-4024.

"Failure of the Justice Department to Claim Approximately 1,200 Acres Out of a Possible 2,900 Acres of Land Within the 1867 Barrett Blackbird Bend Area.

"12. A concomitant failure of the Justice Department to name indispensable parties to any adequate quiet title proceeding for and on behalf of the Omaha Indian Tribe in and to the 1867 Barrett Blackbird Bend Area, the Department of Justice failed:

"a. To assert title in and to approximately 475 acres of land, title to which is claimed adversely to the Omaha Indian Tribe by the aforesaid Sorensons. These lands are vital to the Omaha Indian Tribe and are of great value. Those lands located in the northeastern portion of the Blackbird Bend Area in Sections 27 and 18, Township 24 North, Range 11 East, 6th P.M. are vital to and have been in the past utilized for ingress and egress for the Omaha Indian Tribe to lands within the 1867 Barrett Survey Line. The remaining lands claimed by Sorenson situated in the extreme western portion of the Blackbird Bend Area are vital to the Omaha Indian Tribe as invaluable lands bordering upon the Missouri River and essential to the full enjoyment of the Blackbrid Bend Area. Those lands were abandoned by the Justice Department which failed to name the Sorensons as defendants hence the decree that will be obtained by the Justice Department will be wholly and totally inadequate to obtain for the Omaha Indian Tribe the properties essential to the enjoyment of the Omaha Tribe all of the properties within the 1867 Barrett Blackbird Bend Area, to the irreparable damage of the Omaha Indian Tribe.

"13. The Department of Justice on the face of the complaint filed on May 19,1975 specifically excepted lands from its complaint lands which had passed over a half century ago out of Indian ownership and into non-Indian ownership. Those lands for more than a half century have never been occupied. Those lands totaling 726 acres are claimed by the Omaha Indian Tribe by reason of accretions, reliction and re-emergence of them all as proved by the testimony already in the record of these ongoing cases. Nevertheless the Justice Department's failure has precluded it from obtaining a decree for and on behalf of the Omaha Indian Tribe and therefore the decree cannot accord to the Omaha Indian Tribe the relief to which it is entitled in regard to those lands.

"14. There has thus effectively been abandoned in this proceeding by the Justice Department a total of approximately 1,200 acres of land out of a total of 2,900 acres of land within the 1867 Barrett Blackbird Bend Area to the continuing and lasting irreparable damage to the Omaha Indian Tribe.

"Splitting the Claim of the Omaha Indian Tribe by the Justice Department in and to Lands of the Omaha Indian Tribe.

"15. Through the failure of the Justice Department to claim all of the land in Civ. No. 75-4024 has gravely imperiled the right title and interst of the Omaha Indian Tribe to land outside the Blackbird Bend Area. The *Defendants Wilson et al and RGP Inc. et al* occupy large acreages of land outside the Blackbird Bend Barrett survey title to which resides in the Tribe. The Department of Justice has adamantly refused to amend its complaint to include those lands. That abandonment of a large portion of the Tribes claim against those defendants gravely threatens the Tribes' interest in the present and future litigation which is now pending. The Tribe is confronted with the assertion by those defendants that its claims outside the Blackbird Bend Area are res judicata by reason of Civ. No 75-4024 which does not include those lands. Once again the conduct of the Justice Department reveals to this Court the reasons for the grave anxiety of the Tribe when it considers the offering of evidence by the Justice

Department and the consequences to the Tribe if that course if permitted.

"Previous Efforts of the Omaha Indian Tribe to Secure Release from the Justice Department Representation of the Tribe in Civ. No. 75-4024.

"16. There is incorporated herein by reference the motion dated September 23, 1976 of the Omaha Indian Tribe, the attachments to that motion, all previous motions filed by the Omaha Indian Tribe to protect itself against the insistence of the Justice Department that is proceed to trial in Civ. No. 75-4024 and the response of the Tribe to the resistance of the Justice Department to the Tribes motion of September 23, 1976. It is respectfully charged that the Justice Department by its conduct in these consolidated cases, all as reviewed above, has clearly violated the Constitutional and civil rights of the Omaha Indian Tribe WHEREFORE THE OMAHA INDIAN TRIBE RESPECTFULLY MOVES THIS COURT to sustain the Tribes objection to the offer of evidence in Civ. No. 75-4024 by the Justice Department and further to preclude the Justice Department by an appropriate order from continuing its prosecution of Civ. No. 75-4024 all to irreparable damage to the Omaha Indian Tribe as reviewed above.

Respectfully submitted,

/s/ WILLIAM H. VEEDER

William H. Veeder,
Attorney for the
Omaha Indian Tribe
4808 W. Braddock Road
Alexandria, Virginia 22311

Donald E. O'Brien,
Attorney for the
Omaha Indian Tribe
922 Douglas Street
Sioux City, Iowa 51101

CERTIFICATIONS

I, Edward L. Cline, Chairman of the Omaha Indian Tribe, the Tribe being the real party plaintiff in interest in these consolidated cases, state that I have read the foregoing objection to the Justice Department offering evidence in these cases, and the motion to have the Court sustain that objection. I know the facts to be true and correct and approve the objection and motion all as set-forth above.

/s/ EDWARD L. CLINE

Edward L. Cline,
Chairman of the Omaha
Indian Tribe

"I, Charles P. Corke, having read and considered the foregoing objection and motion opposing the introduction of evidence in these consolidated cases and I personally know the facts recited therein to be true and correct in every respect and join the Tribe in the objection and the motion requesting the Court to sustain the motion as set-forth above.

/s/ CHARLES P. CORKE

Charles P. Corke,
Bureau of Indian Affairs
Representative in these
consolidated cases"

APPENDIX LL
IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*

v.

JOHN R. WILSON, *et al.*, *Defendants.*

C 75-4024

VOLUME I

OMAHA INDIAN TRIBE, etc. *Plaintiff,*

v.

HAROLD JACKSON, *et al.*, *Defendants.*

C 75-4026

OMAHA INDIAN TRIBE, *Plaintiff,*

v.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., *et al.*, *Defendants.*

C 75-4067

TRANSCRIPT OF PRE-HEARING *CONFERENCE* AND SHOW CAUSE HEARING

Courtroom
United States Courthouse
Cedar Rapids, Iowa
March 9, 1987

The above-entitled cause of action came on for hearing, pursuant to assignment.

BEFORE: HON. EDWARD J. McMANUS, Senior Judge.

Reported by:

Daniel J. Shaw, C.S.R.
[copy missing]

and systematically robbed. I think that's where we are tonight.

MR. CLEAR: Your Honor, it's been—

THE COURT: I think I've heard enough on this question. This matter of fraud, Mr. Veeder, has been resolved, at least as far as I'm concerned. You've certainly raised the question time and time again. You have your offer of proof now. If I'm in error, you've got the Eighth Circuit to go to, which I'm sure this case is going to go to regardless of what I do. My sole function here today is to determine this question of contempt, and I gather from the quotes from the Swimmer letters that Mr. Morris' position is that but for this fraud there would be no problem?

MR. VEEDER: That's right, that's my position.

THE COURT: That's what he says, but you know as a lawyer and as a member of this court that I ruled on that question, that it is no longer an issue before me. Now, it may be an issue that you want to bring before the Eighth Circuit, but as far as I'm concerned it is not an issue before me any longer. I've ruled on it, and, as Mr. Clear has pointed out, the Eighth Circuit has affirmed my ruling on that point.

MR. VEEDER: Based upon lies by the Department of Justice.

THE COURT: This I don't know. I've never heard the merits—

MR. VEEDER: That is why we are here. Let us put in some evidence.

THE COURT: That isn't why you're here. You're here on this question of contempt today on my ruling. I had two things to do in this case, if you'll think back. I hadn't seen this case from 19, what, I guess early 1976 until 1985 when Judge Bogue gave it back to me. Mr. Peters brought up Judge Bogue's order, which is the order that determined that this gray property goes to the Tribe and the white part goes to—that's the non-trust lands, in other words, in your exhibit, what is that, Exhibit A, your Exhibit A. My function is to

determine the damage to the improvements, which I've been trying to do, and I haven't been able to do, and also to have a survey conducted. This Exhibit A is the result of that survey. We got that much behind it finally after a lot of struggle and turmoil. Now all I want to do is determine the value of the improvements. That's set up for later this year, sometime in April, to resolve that question. Fraud isn't in this at all for me. That was never raised before Bogue. It was never raised, as far as I know, I don't know what was raised before Bogue because I wasn't there.

MR. VEEDER: Your Honor, let me—

THE COURT: But all I'm saying is, the fraud question, I just can't let that rabbit into this arena.

MR. VEEDER: Your Honor, you're striking the Tribe—

THE COURT: I'm not striking the Tribe. The Tribe has every right to appeal whatever I do, but I'm not going to try the fraud question and I've made that clear in my previous rulings, and you know that, Mr. Veeder, as an officer of the court, you know that, and you keep bringing that back up again and again and again, and I think you're doing a disservice to the Court by doing this.

MR. VEEDER: It might be a disservice to the Court, Your Honor, but it is certainly the only way my Tribe is ever going to get its day in court to demonstrate what transpired.

THE COURT: You made your offer. You've got the question preserved as well as I know how you can preserve it. I don't know whether you took the proper steps because of the Eighth Circuit ruling early on, on my previous ruling, but—I'm sure you did everything you could, everything you can think of to do, but you understand my problem, I'm just trying to bring this thing to some sort of a termination so you can take it to the Eighth Circuit and do whatever you want to do there or to the Supreme Court and do whatever you want to do in the Supreme Court with it.

MR. VEEDER: Absent a finding of fraud, we are dead, because if these people can force their representation on this Tribe, file a fraudulent complaint, then there is no

APPENDIX MM

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN R. WILSON, *et al.*,
Defendants.

NO. C 75-4024

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

vs.

HAROLD JACKSON, *et al.*,
Defendants.

NO. C 75-4026

ORDER
(filed April 1, 1987)

OMAHA INDIAN TRIBE, *et al.*,
Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

NO. C 75-4067

This matter is before the court on the Omaha Indian Tribe's (Tribe) resisted response respecting order to show cause, filed March 9, 1987 construed by the court to be a motion to reconsider the January 14, 1987 order. Denied.

On January 14, 1987, the court modified its June 5, 1975 preliminary injunction and granted defendants possession of the non-trust lands. The order was based on Judge Bogue's January 13, 1984 order, determining which lands will be quieted in the various parties, and the permanent marking of the tribal trust land by the BLM survey. The Tribe seeks

to suspend and hold in abeyance the January 14, 1987 order pending completion of the appeal to be taken, and agrees to hold defendants harmless for any losses that may be experienced during the 1987 crop season.

The Tribe argues that it is not a party to the case of *United States v. Wilson,* from which emanated the January 14, 1987 order, and that it has been denied the right to be heard respecting their charges of fraud.

The January 14, 1987 order was entered in the consolidated cases Nos. C 75-4024, C 75-4026 and C 75-4067. The Tribe is the plaintiff in the latter two cases and is bound by such order. In fact, the consolidation was based on the Tribe's December 31, 1975 motion to consolidate. The Tribe has been vigorously represented by its own counsel throughout the consolidated actions.

The Tribe has not been denied the right to be heard on their charges of fraudulent representation by the Department of Justice. On September 3, 1976, the Tribe moved for a protective order against the Justice Department based upon the alleged improper representation by the Justice Department. Attached to such motion was a Tribal Resolution discussing Evan Hultman's alleged conflict of interest and the Tribe's charges against the Justice Department. The Tribe's motion was denied on October 28, 1976, and the Tribe failed to appeal the order to the Eighth Circuit in *Omaha Indian Tribe v. Wilson,* 575 F. 2d 620 (8th Cir. 1978) or in the numerous subsequent appeals. Since such time the court has denied the Tribe's requests to raise its allegation of fraud due to their untimeliness.

While the court did not specifically set forth the standard for modifying a preliminary injunction in its January 14, 1987 order, it considered such factors and will reiterate them. In modifying a preliminary injunction, a district court is not bound by a strict standard of changed circumstances but is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason. *Movie Systems, Inc. v.*

MAD Minneapolis Audio Distributors, 717 F.2d 427, 430 (8th Cir. 1983).

Since defendants sought relief in the form of a modification of the preliminary injunction filed on June 5, 1975, this court was guided by the principles announced in *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). *See DeFreitas v. Noot*, 527 F.Supp. 147, 149 (D. Minn. 1981). Four factors were balanced: (1) the probability that the defendants will succeed on the merits; (2) the threat of irreparable harm to the defendants should a modification to preliminary injunction be denied; (3) the balance between this harm and the harm that granting the modification would cause to the other parties' litigant; and (4) the public interest. *Dataphase*, 640 F.2d at 114. None of these factors by itself is determinative; the factors must be balanced in each case to determine whether they tilt toward or away from modifying a preliminary injunction. *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986).

Defendants will succeed on the merits at the district court level because Judge Bogue ruled in their favor based upon the Tribe's failure to meet its burden of proof. The court cannot predict the result on appeal since it did not hear the evidence in this case. However, the Eighth Circuit has stated:

> We also recognize that, because of the passage of time involved, the party having the burden of proof inevitably may face unsuperable barriers, and if the district court finds this to be so, the end result will be that the Tribe will prevail only as to the trust lands formerly in the possession of the private defendants, but not as to the remainder.

United States v. Wilson, 707 F.2d 304, 311 (8th Cir. 1982).

Continuing the June 5, 1975 preliminary injunction would irreparably harm defendants by preventing them from conducting their private survey, which is necessary to quiet title in the defendants, and by preventing them from erecting boundary fences, which will help to decrease confrontations over possession.

The modification did not harm the Tribe. The non-trust lands are farmland and Iowa's natural wildlife area. Any loss to the Tribe from an inability to farm can be compensated by money damages and the state's wildlife area has not been used by the Tribe in any profit-making endeavors.

Continuing the June 5, 1975 order would also harm the public interest. The Tribe and its tribal chairman have stated that they will defy the court's orders and their agents have confronted members of the public on Iowa's non-trust land and ordered them to leave. Granting a stay would tend to encourage further avoidance of court orders and could be construed as a reward for the Tribe's threats of confrontation and violence.

The January 14, 1987 order was properly issued and the Tribe has not justified reconsidering such order.

It is therefore

ORDERED

1. Motion to reconsider denied.

2. The court's March 17, 1987 order restricting the defendants access to the non-trust lands is stricken.

3. The private survey shall commence promptly. The private defendants shall provide the Tribe written notice of the survey's date of commencement at least five (5) days prior to such commencement date. The Tribe's surveyor may be present at such survey. The survey shall be completed by not later than May 15, 1987. The survey shall be reduced to a survey drawing and filed with this court by not later than May 29, 1987.

4. All party plaintiffs to this consolidated action, including the Omaha Indian Tribe and its members, representatives and agents are enjoined from interfering in anyway with said survey and shall permit the placement of stakes, flags and other survey monuments along the boundaries in order to identify the described lines. The defendants, their agents, employees and surveyors shall be permitted upon tribal lands

as necessary to conduct the survey and to construct boundary fences.

5. The Tribe, its officers, agents, members, and police shall not arrest any of the defendants, their agents, employees or representatives while on the non-trust lands, or while on trust land for the purpose of surveying or constructing boundary fences.

6. Tribal police shall not patrol the non-trust lands and shall not assert peace officer status or bear arms while on such lands.

7. The Tribe, its officers, agents, members, and police shall not enter the non-trust lands without prior authorization by defendants or the court, and shall not interfere with the state's access to its land and the state's actions in cleaning up and removing the trees felled on state land.

8. By not later than April 9, 1987, the Omaha Tribal Council shall provide a copy of this order to all of its officers, agents, members and police, and shall explain the order and instruct such persons to comply with the provisions of this order.

April 1, 1987.

EDWARD J. MCMANUS

Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

APPENDIX NN

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN R. WILSON, et al.,
Defendants.

No. C-75-4024

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

v.

HAROLD JACKSON, et al.,
Defendants.

No. C-75-4026

OMAHA INDIAN TRIBE, etc.,
Plaintiff,

v.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

No. C-75-4067

HEARING ON MOTIONS TO SHOW CAUSE

Courtroom, Third Floor
Federal Building
101 First Street, SE
Cedar Rapids, Iowa
Friday, May 1, 1987

BEFORE: THE HONORABLE EDWARD J. McMANUS.

LAURA R. FULTON—CERTIFIED SHORTHAND REPORTER

a statement.

THE COURT: Go ahead.

THE WITNESS: On March 9th, Your Honor, you contradicted yourself by saying that you heard the fraud charges—you stated you didn't hear the merits on the fraud charges on March 9th.

THE COURT: That's true, isn't it?

THE WITNESS: That's what I said, that you said that. Then you come down with the order of April 17th saying that you heard the fraud charges.

THE COURT: You received a copy of my order of April 1st, there's no question about that? That's the one we're here for today.

THE WITNESS: Yes.

THE COURT: On the last paragraph on page 2, I stated that, "The tribe has not been denied the right to be heard on their charges of fraudulent representation by the Department of Justice. On September 3rd, 1976, the tribe moved for a protective order against the justice department based upon the alleged improper representation by the justice department. Attached to such motion was a tribal resolution discussing Evan Hultman's alleged conflict of interest and the tribe's charges against the justice department. The tribe's motion was denied on October 28th, 1976"—and again, this was by Judge Bogue, who presided over this case for most of the time in its long history—"and the tribe failed to appeal the order to the 8th Circuit in Omaha Indian Tribe versus Wilson or in the numerous subsequent appeals. Since such time, the Court has denied the tribe's request to raise its allegation of fraud due to their untimeliness." Do you remember reading that?

THE WITNESS: Yes, I do.

THE COURT: You've known about this since 1975, and it wasn't raised in this case until—well, until I got it back in 1985. If it was raised, it might have been raised indirectly

before Judge Bogue at that time, but he denied it, and with all the appeals that have gone on in this case, that question was never raised on appeal. Now, that was my reason for denying the claim of fraud at this time, and I've made it abundantly clear in the hearings that we've had here that I'm not going to hear the fraud claim. Now, if my ruling is wrong or in error, the appellate courts, either the 8th Circuit or the Supreme Court of the United States—you all have been to both of those places—can reverse me and order a hearing on that question.

Now, my function here is to try to bring this case to an end. It's 12 years old.

THE WITNESS: I realize that.

THE COURT: It just can't go on forever. If you take the position you're not going to abide by the Court's order until you get a hearing on the fraud and I take the position you're not going to get a hearing on the fraud, where do we stand?

THE WITNESS: I've been saying that to my tribal members, once we get our fraud charges heard, if we lose, I'll accept that.

THE COURT: I understand that, but our situation today is you say you're not going to comply with my order to permit these people onto their—to the land. And Judge Bogue's order that found who owns what portion of this Blackbird—or Barrett survey property, that order is subject to appeal, and that may be reversed. I haven't any idea what the court of appeals is going to do about that, but it binds me. I have to accept Judge Bogue's order as the subsequent judge in this case. So today here we are. You say, "I'm not going to permit the private defendants on their land or the State of Iowa on its land as Judge Bogue determined until I get a hearing on our fraud charge in this court from me," and I say, "I'm not going to give you a hearing on that." I've already said it and said it and said it. Now, that's where we are, and I'd like to know if you're going to persist in that position. I can assure you I'm going to persist in my position that you're not going to get a hearing on the fraud charge.

THE WITNESS: Well, before I answer that, I would like to know why.

THE COURT: I've told you why. I've just read it to you. Because it's untimely. It hadn't been brought up before for the eight years this case went on. I had nothing to do with it during that period, and it was never brought before Judge Bogue. Now, I don't know, you'd have to ask Mr. Veeder why that wasn't done. I don't— He's your lawyer, and I don't know why it wasn't done.

MR. VEEDER: I'd be glad to address it now.

THE COURT: Let me finish visiting with the witness, Mr. Veeder. You can speak as long as you wish.

MR. VEEDER: I certainly want the right to speak, and I'm entitled to it.

THE COURT: You're entitled to it when I'm through examining Mr. Morris.

THE COURT: This is my problem, Mr. Morris. Do you see it?

THE WITNESS: Yes, and I represent 5,000 tribal members also. I haven't said this before, but if this causes me to go to jail, then I'll be willing to do that, but I still persist that we haven't had our fraud charges heard.

THE COURT: Okay. Well, in other words, I want to get that straight. You are prepared to persist in this position—

THE WITNESS: Yes, I am.

THE COURT: —regardless of what I do?

THE WITNESS: Yes, I am.

THE COURT: Well, I don't have any—I don't have any great enthusiasm to send anybody to jail. I've tried to be as patient as I could, and have tried to give you as many chances as I thought were reasonably fair under the circumstances, but I can't permit orders of the Court to be ignored, regardless of the motivation. I know you're sincere

in your position, and I respect that, but that still is not compliance with the order.

THE WITNESS: I realize that.

THE COURT: The order must be complied with, and I haven't decided how I'm going to get that compliance or if I can. I don't know, but I'm going to do something. I had that 17th order that I'd hoped that— That was for the contempt order. Fining the tribe $1,000 a day and you the 500, that was, to me, the minimum that I could do under the circumstances to try to get compliance and for you to try to resolve these problems on appeal, rather than to try to do it this way, by being obstinate as to the Court's order.

THE WITNESS: What is there to appeal? There's no elements to the fraud charges. It hasn't been heard.

THE COURT: Again, I'm not your—I'm not your lawyer. I'm not your lawyer. You've got my ruling that said that it was untimely—bringing the fraud up now is untimely, and you're getting your advice from Mr. Veeder, and I'll permit him to speak on this thing in due time, but I just—I understand your position and that you're going to remain—you're going to continue with these confrontations, you're not going to abide by that April the 1st order until you get your hearing on the fraud charges from me; is that correct?

THE WITNESS: That's correct.

THE COURT: That's it. All right. Any other questions?

MR. SARCONE: I have none, Your Honor.

MR. PETERS: No, Your Honor

THE COURT: All right. You may step down, Mr. Morris.

(Witness excused.)

THE COURT: Mr. Veeder?

MR. VEEDER: Your Honor has raised a whole series of issues in regard to the kind and type of representation that I have given the tribe.

THE COURT: I haven't intended to intimate anything about your representation, Mr. Veeder.

MR. VEEDER: Well, when you say that—

THE COURT: I'm saying you're the lawyer—the personal lawyer for the tribe. Mr. Clear is the Government's lawyer for the tribe, and I intended no inference one way or the other about the quality of your representation.

MR. VEEDER: I'm saying, on the subject, Your Honor, you did raise the point, and the room is full of Omahas, and they're entitled to know. You have raised the most single critical issue, and I have no intention to criticize this Court for the statement that the tribe has not been denied its day in court. I basically disagree with that, because the tribe has not had its day in court on the issue of fraud.

I moreover state, Your Honor, that the charges of fraud, as I brought to Your Honor's attention in the court—in the chambers today, is jurisdictional in nature and can be raised at any time. But that's wholly beside the point in regard to your position now. Your order of April 5th, 1976, which was a sui sponde order in which you constricted the tribe back from the original 6,390 acres to 1,900 acres, came as a total surprise to me, and it was Your Honor, and not Judge Bogue, that did that.

Our position, then, is now very, very clear. If you look at your April 5th, 1976, order, you'll find that it is not final in regard to the issue. There was no finality in it. Appeal was not available at that time, I assure Your Honor, in regard to the exercise of your discretion. I thoroughly briefed that ten years ago.

But the fact remains—and as I brought to Your Honor's attention this morning—the basic and fundamental charge of fraud is this: That Myles E. Flint, with full knowledge of what he was doing, forced a fraudulent complaint upon the tribe which is jurisdictional in nature and can be raised at any time. I did not delay in that, I assure Your Honor that.

There was never a final judgment until January 13th, 1984, at which time I immediately raised the point, and at

that time Judge Bogue said he was going to do just what Your Honor is saying now, "This thing has pended 12 years, and we're going to get rid of it."

Bear in mind, when Your Honor says "get rid of it," you're consummating the fraud of the Department of Justice that's been practiced on the tribe.

THE COURT: Mr. Veeder, I didn't say we were going to get rid of it. I said it has to come to an end some day.

MR. VEEDER: You said this case has to be terminated.

THE COURT: I don't like the inference of that, that I'm trying to get rid of it. I'm trying to bring it to a termination.

MR. VEEDER: The termination, Your Honor, does this—

THE COURT: —gets you the final judgment you're talking about.

MR. VEEDER: It gives us a final judgment predicated upon the fraud that Mr. Clear has been practicing for 12 years, and we are entitled to be heard on the basis of the complaint that was fairly and honestly drafted by me and filed. We have been subjected to the fraud of the Department of Justice lawyers who—

THE COURT: Mr. Veeder, I don't want to rehash this fraud business now. I've heard it time and time again, and I've made my position clear. I've reiterated it in the order of April 1st, and as far as I'm concerned, that's this Court's position.

MR. VEEDER: Well, I'll say this, Your Honor, what I said to you this morning in chambers: As a lawyer, I have two things. I have to weigh my conduct in this courtroom with Your Honor, and I have to weigh what I think is a gross impropriety practiced on my tribe, and I come heavily down on the side of the tribe, because of the history of fraud practiced on the Indians. Now, Your Honor, I know how we are. I know some very brave men are saying, "I'd rather go

to jail. I'd rather go to jail than be robbed by James J. Clear or Mr. Flint." That's what they're saying. I can tell them something more that the Hultman fraud is of such magnitude, if we were heard on it—But we were not heard.

And I want to make one thing clear, Your Honor, that has to be cleared up. Whoever did the research for you was a very patient person. They found the reference to Hultman in a whereas clause of an ancient resolution.

THE COURT: It was quite hard to find, I agree.

MR. VEEDER: They went—

THE COURT: And it's by innuendo, rather than by direct reference.

MR. VEEDER: That's the point. That's the point, because when I went back through this thing—and I'm a pretty careful lawyer, or I wouldn't be around—*I could not* find a scintilla, and then you came up with the whereas clause. And I have to admire the Department of Justice, whoever did that, *because I was simply flabbergasted that we could* find a whereas clause to say we had our day in court. When these people go to jail, I should go with them, because I have told them, "You have been systematically robbed." I say it in the record today, the tribe has been systematically robbed.

THE COURT: And therefore it's okay to violate a court order?

MR. VEEDER: I didn't say that.

THE COURT: Isn't that the substance of what you're saying?

MR. VEEDER: Well, I—No, I didn't say that they should violate the court order. I said if they violate, pray God—

THE COURT: I can understand.

MR. VEEDER: I said I'll defend them, because they have been systematically robbed in this court.

THE COURT: All right. Your next witness?

MR. VEEDER: Call Eddie Cline, please.

APPENDIX OO

IN THE

United States District Court of Appeals

FOR THE EIGHTH CIRCUIT

No.

In re

OMAHA INDIAN TRIBE, Petitioner

UNITED STATES OF AMERICA,
Plaintiff,

v. **C 75-4024**

JOHN R. WILSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE,
Plaintiff,

v. **C 75-4026**

HAROLD JACKSON, *et al.*,
Defendants.

OMAHA INDIAN TRIBE,
Plaintiff,

v. **C 75-4067**

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

PETITION FOR WRIT OF MANDAMUS
AND/OR
WRIT OF PROHIBITION

PETITION

William H. Veeder
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Washington, D.C. 20006
[202] 466-3890

Attorney for
Omaha Indian Tribe

Question No. 4. Whether the court below could properly deny Petitioner Tribe its right to be heard respecting Petitioner Tribe's charges of fraud against James J. Clear with full knowledge of Petitioner Tribe's charges of fraud against James J. Clear, Attorney, Department of Justice who, with full knowledge of the Hultman and Flint fraud, has at all times actively participated in that fraud by forcing his unwanted, rejected and totally improper representation upon Petitioner Tribe?

I.

FACTS SUPPORTING PETITION
The Hultman-Flint-Clear "Sell out"

Petitioner Omaha Indian Tribe has repeatedly requested the Court below to set down for hearing the charges made by Petitioner Tribe that Evan L. Hultman, United States Attorney, Cedar Rapids, Iowa, had fraudulently purported to represent Petitioner Tribe in the court below in the case of *United States v. Wilson, Lakin, R.G.P. Inc., State of Iowa . . . et al.*, Civ. No. 75-4024.[1] In the complaint filed in Civ. No. 75-4024, Evan L. Hultman "excepted" certain lands in Sections 11 and 14, T. 24 N., R. 10 E., of the 6th P.M., denying title in Petitioner Tribe to those lands. Those "excepted" lands, concerning which Evan L. Hultman, as Attorney General for Defendant State of Iowa, retained for Defendant State of Iowa totalled approximately 700 acres.

II.

In Appendix 2, Petitioner Tribe's motion filed in the court below on November 7, 1985 to have Evan L. Hultman disqualified and to enjoin Hultman from further participation in Civ. No. 75-4024, there is reviewed in detail and graphically displayed the "excepted"

[copy missing]

[1] Appendix 1, Complaint to Quiet Title . . . Civ. No. 75-4024.

Petitioner Omaha Indian Tribe by seeking to obtain a final judgment effectuating the Hultman fraud.[18] As expressed by the trial judge, Clear's presence in the courtroom was "mind boggling, to say the least."[19]

XII.

When the " . . . Opposition to Omaha Tribe's Motion to Disqualify . . ." failed to meet the specific charges of fraud practiced upon Petitioner Omaha Indian Tribe by Evan L. Hultman and James J. Clear, Attorney, Department of Justice—but rather sought to avoid responsibility by alleging that the fraudulent complaint in Civ. No. 75-4024 was "prepared in Washington"—Petitioner Tribe filed with the court below on January 9, 1986 a motion for summary judgment with supporting affidavits. In that motion for summary judgment, there was restated the gravamen of the motion to disqualify Messrs. Hultman and Clear. Named in that motion for summary judgment, in addition to Messrs. Hultman and Clear, is Myles E. Flint, presently Deputy Assistant Attorney General, Department of Justice, who actively participated in the formulation and filing of the fraudulent complaint in Civ. No. 75-4024.[20]

XIII.

In filing the January 9, 1986 Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Petitioner Tribe stressed that there were no genuine issues of fact raised in the "Opposition" to the motion to disqualify Hultman and Clear. Most assuredly the "Opposition" did not place in issue these facts:

(a) Evan L. Hultman, United States Attorney, had "excepted" from the complaint filed purportedly on behalf of

[18] Appendix 2, p. 30, *et seq.*
[19] *Ibid.*, at p. 32; *See Prayer* for hearing, p. 55, paras. 7 and 8.
[20] Appendix 4, p. 5, para. 5; Appendix 4A, p. 8, para. 25, *et seq.*

Petitioner Tribe denying Petitioner Tribe title to those lands which he, Hultman, as Attorney General for Defendant State of Iowa, had retained for Defendant State of Iowa in litigation in which Mr. Hultman had previously participated with Defendant Lakin and the predecessor of Defendant R.G.P., Inc., involving the same lands as claimed by Petitioner Tribe;

(b) Evan L. Hultman had disclaimed title on behalf of Defendant State of Iowa and had conceded title to those lands in Defendant Lakin and the predecessor of R.G.P., Inc. and abandoned any claim for Petitioner Tribe outside of the Barrett Meander Line; and

(c) It was not denied that James J. Clear had participated in the case Civ. No. 75-4024, effectuating the Hultman fraud on Petitioner Tribe.[21]

XIV

By an affidavit executed by Elmer M. Clark, there is spelled out with specificity the participation by Myles E. Flint, Department of Justice, in the preparation of the fraudulent complaint in Civ. No. 75-4024.[22] In charging Mr. Flint with fraud, as set forth in Petitioner Tribe's Motion for Summary Judgment, Petitioner Tribe underscores the fact that Mr. Flint acted in concert with Mr. Hultman and Mr. Clear in the fraud practiced on Petitioner Tribe.[23]

XV

In the affidavit of Elmer M. Clark, who had personal knowledge of all of the claims of Petitioner Tribe and the defendants in the Blackbird Bend litigation, there is spelled out in detail two primary facts: (1) Myles E. Flint, then Deputy to the Chief, General Litigation Section, Department of Justice, and who was engaged in preparing the complaint for Civ. No. 75-4024, was personally advised by Mr. Clark

[21] Appendix 4; Appendix 4A, p. 6, para. 19, *et seq.*
[22] Appendix 4A, p. 8, para. 25, *et seq.*
[23] Appendix 4, p. 5., para. 5.

of the impropriety of seeking to limit the claims of Petitioner Tribe to *the Barrett Meander Line; and (2) though Mr. Clark* had "sufficient information to establish title of Petitioner Tribe far beyond the Barrett 1867 Meander Line," he, Mr. Clark, had not completed his investigations and he told Mr. Flint that ". . . it would be improper to file a Complaint to quiet title to only the lands within the Barrett Meander Line by reason of the fact that the Tribe's claim should encompass all the lands to the fullest extent possible within the Blackbird Bend Area."[24]

XVI

Mr. Charles P. Corke, the Bureau of Indian Affairs Official charged with the preparation and prosecution of the Blackbird Bend litigation, summarizes fully Mr. Flint's disregard of the interests of Petitioner Tribe and Mr. Flint's desire to support the interests of the defendants with these statements in summary:

. . . .

4/18/75 — *Meeting between Deputy Assistant Attorney* General Kiechel and tribal officials where Mr. Kiechel pledged that no Blarkbird Bend suit would be filed without tribal concurrence.

. . . .

4/25/75 — Meeting at Department of Justice with Chief, General Litigation Section Floyd France (his *office), France's Deputy Myles Flint, Herb* Becker and Marieclare Hale from Interior Solicitor's Office, and Corke and E. M. Clark. Corke and Clark gave status report on investigations and recommended not filing quiet title proceeding until ongoing investigation to ascertain extent of Omaha meritorious claim to

[24] Appendix 4A, p. 9, para. 26.

be completed by end of summer. It was emphasized to France and Flint that sufficient information was not available for initiating a complex quiet title suit. Corke and Clark learned that France and Flint had been communicating with squatters' attorney, exchanging information and France indicated agreement with squatters' desire for immediate filing of quiet title action by the United States, all prior to referral and without any factual knowledge. At meeting, Becker and Hale hand-delivered Solicitor's litigation report and recommendations to Justice. Corke later learned the recommendations were to file litigation to:

1. Quiet title.
2. Seek monetary damages for back rentals.
3. Obtain a restraining order against squatters.

4/28/75 Letter from Solicitor's Staff (Becker) to squatter attorney sending copy of VTN "rejected" report against tribe's wishes and to tribe's detriment.

4/29/75 Meeting with Messrs. Kiechel and France at Justice with the Omaha Tribal Chairman, four Council members and Veeder. Kiechel and France insisted that they would proceed to institute a case as requested by Interior with consequent ouster of Indians if that occurs, and that they would prepare the case *after* it was initiated.[25]

On the factual and legal background set forth above, Petitioner Omaha Indian Tribe presents this

PRAYER FOR RELIEF

1. This Court enter an appropriate order restraining the court below from proceeding further in quieting title among the parties without first having fully heard Petitioner Tribe's charges of fraud, entering appropriate findings respecting that

[25] Appendix 7; *see* pp. 4 and 5 of Attachment marked Appendix A.

fraud, and establishing by an appropriate order; whether or not that fraud has in fact been proven all as contended for by Petitioner Omaha Indian Tribe.

2. This Court declare and determine that Petitioner Omaha Indian Tribe must not be required to relitigate the issues that were fully tried on the merits respecting title to the entire 6390 acres within the Blackbird Bend Area, all as fully reviewed above; and

3. For such other and appropriate relief as may be proper under the circumstances.

Dated June 11, 1986.

Respectfully Submitted,

WILLIAM H. VEEDER

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[202] 466-3890

Attorney for
Omaha Indian Tribe

APPENDIX PP

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 86-1717

IN RE OMAHA INDIAN TRIBE,

Petitioner

ON PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

BRIEF FOR THE UNITED STATES, Respondent

1. *Introduction*—This controversy concerns the motion filed by Mr. William Veeder, counsel for the Omaha Indian Tribe, to disqualify attorneys representing the United States from further participation in Docket No. C75-4024 *("Wilson")* based on allegations of fraudulent misconduct. District Judge McManus denied the motion, and imposed sanctions on Mr. Veeder in an order entered on February 21, 1986. On April 11, 1986, the district judge denied Mr. Veeder's further motion to disqualify himself for his alleged bias and prejudice in ruling against the Tribe and refusing to disqualify the government attorneys. Mr. Veeder, on behalf of the Tribe, asks this Court to grant the extraordinary writ of mandamus and order the district court to hold a hearing on the alleged fraud of the government attorneys prior to completion of *Wilson*. Nowhere in the 46-page Petition does Mr. Veeder directly challenge Judge McManus' April 11, 1986 order.

The petition filed by the Tribe is meritless and should be denied by this Court. Moreover, this Court should order

Mr. Veeder to pay the costs and attorneys' fees of the United States in responding to the petition as a sanction for his filing of a totally frivolous pleading.

2. *Factual background.*—This litigation has resulted in numerous reported decisions, listed in chronological order below.[1] It began as a title dispute over the boundaries of the Omaha Indian Reservation, created by treaty on March 16, 1854, along the west (or right descending) bank of the Missouri River in what was then the territory of Nebraska. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 658-659 and n.4 (1979). In 1867, a survey by T.H. Barrett of the General Land Office established that, at that time, the Missouri River, where it was the boundary of the reservation, looped sharply to the east, creating a "lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa." *United States v. Wilson*, 433 F. Supp. 67, 69 (N.D. Iowa 1977). Throughout this litigation, this lobe has been referred to as the Barrett Survey area.

Over the years, the Missouri River has shifted its course many times—so often, in fact, that the States of Iowa and Nebraska, whose common boundary the River was, entered into an Interstate Compact in 1943 establishing a fixed boundary between them. *See Nebraska v. Iowa*, 406 U.S. 117 (1972). This fixed boundary, though, was not congruent with the River as it existed in 1943 (see *Wilson v. Omaha Indian Tribe*, 442 U.S. at 659 n.6), or as it exists today. In fact, the Barrett Survey area, once west of the Missouri River and thus immediately contiguous to the Reservation, is now east of the Missouri River and therefore separated from the other lands of the reservation. See *id.* at 659. For many years prior

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[1] *United States v. Wilson*, 433 F. Supp. 57 and 433 F. Supp. 67 (N.D. Iowa 1977), vacated and remanded *sub. nom. Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978), vacated and remanded. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); remanded to the district court, *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir.) cert. denied, 449 U.S. 825 (1980); *United States v. Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981), reversed and remanded, *United States v. Wilson*, 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983) cert. denied, 104 S. Ct. 1281 (1984); *United States v. Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984).

to 1975, non-Indians farmed the lands within this cutoff loop and claimed ownership of those lands (*id.* at 659-660).

In 1975, the United States brought an action (C75-4024, *Wilson*) to quiet title, as trustee for the Omaha Indian Tribe, to "all those lands now lying within the Barrett Survey, approximately 2900 acres * * *." *United States v Wilson*, 433 F. Supp. at 70.[2] At about the same time, the Tribe brought two actions in federal court, Civ. Action Nos. 75-4067 and 75-4026 ("the *Omaha Tribe* cases"), seeking relief similar to that sought by the United States, but with two important differences. First, the Tribe sought to quiet title in itself to a larger area (encompassing approximately 11,000 acres); in addition, the Tribe sought damages for the claimed illegal trespasses. *Ibid.* On motion of the Omaha Tribe, the three cases were consolidated. Subsequently, the district court severed from the consolidated cases the Tribe's claim to title to the additonal acreage, as well as its claim for damages. "This left 2900 acres within the Barrett Survey as the subject matter of this [litigation] since the dispute over that land is common to all three lawsuits." *Id.* at 69.

The United States based its claim to the lands within the Barrett Survey area on the theory that the Missouri River had changed its course avulsively (see generally *Arkansas v. Tennessee*, 246 U.S. 158, 175 (1918)), and, accordingly, that title to land within the Barrett Survey had not been affected by the subsequent change. The defendants, on the other hand, argued that the River's migration westward had been by the natural and gradual processes of erosion and accretion and that the boundary of the reservation therefore retreated westward with the River. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660.

Applying the legal principles established by the Supreme Court, this Court ordered title to approximately 2,200 of the 2,900 acres claimed by the United States to be quieted in the United States as trustee for the Tribe. *Omaha Indian Tribe*

[2] Certain so-called "fee-patented lands," totalling approximately 400 acres, were excepted from the claim of the United States. These lands had earlier been allotted to individual members of the Tribe and subsequently sold to non-members. See *United States v. Wilson*, 433 F. Supp. at 70.

v. *Wilson*, 614 F.2d 1153 (8th Cir.) cert denied, 449 U.S. 825 (1980). The question of title to the remaining 700 acres within the Barrett Survey area — the so-called "fee-patented lands" not claimed by the United States as well as lands claimed by the State of Iowa— were resolved by the district court in a decision entered January 13, 1984 (578 F. Supp. 1191). There, the district court held that "all allotted lands contained in the 700 acres * * *, which were not fee-patented and which are not otherwise claimed by the State of Iowa, will be quieted in the Tribe after survey * * *;" 578 F. Supp. at 1194.[3] The court's order was certified for interlocutory appeal pursuant to 28 U.S.C. 1292(b), but permission to appeal was denied by this Court on October 9, 1984 (8th Cir. Nos. 84-8128, 84-8129). It is apparent, then, that this decade-long litigation over the 2900 acres of Barrett Survey lands is nearing completion. Still to be tried, though, are the two *Omaha Tribe* cases filed by the Omaha Indian Tribe to an additional 8000 + acres and the related issue of damages.

3. *The motions to disqualify.*—On November 7, 1985, counsel for the Tribe filed a motion to disqualify Evan L. Hultman and James J. Clear and their successors from representing the United States in *United States v. Wilson.* Hultman, at that time the United States Attorney for the Northern District of Iowa, and Clear, an attorney for the Department of Justice, were charged by counsel for the Tribe with misconduct in the filing of the *Wilson* complaint *more than ten years ago.*[4] The gist of the motion was that the complaint was drafted by Mr. Hultman in order to fulfill an allegedly illegal commitment made by him more than ten years prior to the filing of the *Wilson* complaint, when he was Attorney General of Iowa. This "misconduct" consisted of the United States' decision to seek to quiet title to 2900 acres of land in the Barrett Survey (Appendix 2 at 12), instead of

---

[3] Although the survey is now complete and has been accepted by the district court, no final judgment has been entered because the issue of the valuation of improvements to the trust property remains to be resolved. See 578 F. Supp. at 1196.

[4] The motion to disqualify is contained in the Appendix prepared by counsel for the Tribe to his Petition for Mandamus as Appendix 2; the complaint filed in *Wilson* is included as Appendix 1.

the larger acreage claimed by the Tribe in the *Omaha Tribe* cases. The initial motion to disqualify filed by Mr. Veeder requested the district court to, *inter alia*, order Hultman, Clear, and Deputy Assistant Attorney General Myles E. Flint (as Clear's supervisor) to appear in court to explain the background of the *Wilson* complaint.[5] (Appendix 2 at 55-56.) The United States filed a response to this motion (Appendix 3), but, before a ruling by the district court, the Tribe filed a pleading entitled "Motion for Summary Judgment" (Appendix 7 at 2), requesting the court to declare the *Wilson* complaint to be "null and void and of no force and effect, vacated, and set aside." The United States opposed the Motion, and requested the district court to impose sanctions on Mr. Veeder (Appendix 6).

On February 21, 1986, the district court denied the Tribe's motions and granted the government's request for sanctions against counsel for the Tribe (Appendix 8). Finding the motion to disqualify "untimely" and meriting "no serious attention or consideration" (*id.* at 2), the court summarily rejected it (*id.* at 3). The so-called Motion for Summary Judgment was determined by the court to be frivolous (*id.* at 4):

> The Tribe's summary judgment motion is so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted. The arguments presented duplicate the Tribe's motion to disqualify, and the motion seeks judgment against non-parties which is patently frivolous. Accordingly, sanctions will be imposed on the Tribe's counsel who signed the motion for Summary Judgment.

This ruling of the district court was followed by the motion (Appendix 9) by Mr. Veeder on March 17, 1986, to disqualify the judge based on his asserted bias and lack of impartiality. The motion was denied on Ajpril 11, 1986 (Appendis 10). The instant petition followed.

---

[5] Although the Motion identified only Hultman and Clear as the responsible federal officials, Mr. Veeder subsequently expanded his request for relief against Deputy Assistant Attorney General Flint as well.

ARGUMENT

I

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES THAT JUSTIFY ISSUANCE OF A WRIT OF MANDAMUS

A writ of mandamus is a drastic remedy to be invoked by a court of appeals only in extraordinary situations. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980). As this Court stated in *Central Microfilm Service* v. *Basic/Four Corp.*, 688 F.2d 1206, 1212 (1982), "a district court's action generally must be 'blatantly wrong' to justify mandamus relief * * *." Moreover, the remedy of mandamus "is not available to review a claim that the district court merely erred in ruling on a matter within its jurisdiction." *United States ex rel. McQueen* v. *Wangelin*, 527 F.2d 579, 582 (8th Cir. 1975). It is, instead, limited to "exceptional circumstances" where a party would be irreparably harmed by awaiting final judgment before challenging interlocutory orders. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 478 n.13 (1981).

It is hard to imagine a less appropriate case for the granting of a writ of mandamus. The actions complained of by petitioner have resulted in a decree favorable to the Tribe on approximately 2,000 acres of the land within the Barrett Survey area and provide the precedential context for resolving the remainder of the outstanding claims.[6] Although Mr. Veeder may disagree with the litigating decision made by the United States in 1975, such a disagreement surely does not give rise to an action over a decade later challenging the bona fides of that decision. Moreover, the Tribe will have an opportunity in the remaining two cases to establish that movements of the Missouri River resulted in the creation of new tribal lands. As the district court held in its 1981 decision[7] in this case, "the Tribe may bring an action to

[6] A survey conducted by the Bureau of Land Management indicates that the Tribe will obtain title to the beneficial interest in 1938 acres of land.

[7] Inexplicably, Mr. Veeder claims (Petition at 36) that it was not until 1984 that he realized that the district court would enter a decree in the *Wilson* case relating solely to the acreage at issue there. The severance order, however, had been entered in 1975. See 433 F. Supp. at 69. Counsel's claim of surprise, then, is clearly unfounded.

recover accretions to tribal lands, notwithstanding the refusal of the United States to add these lands to its complaint in these consolidated cases." 523 F. Supp. at 899. That is exactly what the Tribe has done in the two remaining *Omaha Tribe* cases. Mr. Veeder's charge (Petition at 35) that the district court "is seeking to constrict Petitioner Tribe's claims to the fraudulent Hultman—Flint complaint" is simply wrong. The Tribe will have an opportunity to establish its claim of title, using whatever relevant evidence was introduced at the *Wilson* trial, as well as any additional evidence developed later. As a litigant, the Tribe is entitled to no more.

II

THIS COURT SHOULD AWARD THE UNITED STATES ITS COSTS AND ATTORNEYS' FEES IN DEFENDING AGAINST MR. VEEDER'S FRIVOLOUS PETITION

This outline of the tortuous history of this litigation, which has resulted in a decree quieting title in the Tribe to a substantial portion of the Barrett Survey area, demonstrates the utter lack of merit to this Petition. Mr. Veeder, in an attempt to expand the favorable decree obtained by the United States to encompass all the acreage in the *Omaha Tribe* cases, asks this Court (Petition at 46) to "declare and determine that Petitioner Omaha Indian Tribe must not be required to relitigate the issues * * * respecting title to the entire 6390 acres within the Blackbird Bend Area * * *." In essence, Mr. Veeder argues that the *Wilson* claim, by which the Tribe obtained some 2200 acres, must be declared null and void and of no effect, but that the Tribe should not be required to prove its claim of title to the lands outside the Barrett Survey. Mr. Veeder apparently is of the belief that by engaging in name-calling and character assassination, he will be spared the need to litigate that which the Tribe believes is theirs. Clearly unable to articulate a legal basis for such a result, Mr. Veeder engages in histrionics. In his 46-page Petition, he uses the words "fraud" or "fraudulently" 86 times. Although difficult to follow, his argument apparently

is that the decision made by the United States to seek to quiet title to those lands within the Barrett Survey was in furtherance of a conspiracy between the State of Iowa and the private landowners to unlawfully deprive the Omaha Indian Tribe of title to the rest of the Blackbird Bend lands. This claim is not new. In 1975, Solicitor of the Interior Frizzell wrote to Attorney General Edward Levi on this issue (Attachment A). He stated that he took "strongest issue with claims by the Tribe and others that lawyers * * * in the Justice Department * * * in some way agreed with the non-Indian claimants to file the suit and thereby impair the Indian's position. Within the past two weeks, the Tribe—counseled unwisely by a BIA employee—filed a petition in court to have the quiet title suit dismissed on the ground that the federal attorneys were guilty of unprofessional conduct and had totally abandoned the Tribe's interests. These charges are totally absurd and without any foundation whatever." In 1977, Attorney General Edward Levi advised Congressman Sidney Yates (Attachment B)[8] that these charges were baseless. The charges are no more true today than they were in 1975.

It is simply irrelevant that former United States Attorney Evan L. Hultman was the Attorney General for the State of Iowa when certain landowners in the Blackbird Bend area filed suit to quiet title in 1963 and 1965, naming as one defendant the State of Iowa (Appendix 2A). In answering those complaints, the State claimed no "right, title, or interest in or to the real estate" described in those complaints (*id.*; Appendix 2B). Iowa's position, then, was not inconsistent with the Tribe's position that it had title to those areas. As to the alleged "fraud" of Deputy Assistant Attorney General Myles Flint and Department of Justice Attorney James Clear, the scope of the litigation initiated by the United States was based in part on the recommendation of Mr. Veeder himself, at that time an employee of the Department of the Interior. See Attachment B, pp. 2-3 and Attachment C, pp. 23-25.

[8] This letter was attached to the Opposition to Omaha Tribe's Motion to Disqualify filed by the United States on December 20, 1985 (Appendix 3).

And, as detailed above, the United States has successfully prosecuted the quiet title action brought on behalf of the Tribe, while the cases brought by Mr. Veeder have not yet been completed. The United States will not respond here to the other points raised by Mr. Veeder in his Petition, as these charges have been answered at great length in correspondence between the Departments of the Interior and Justice, and those agencies and Congressman Sidney Yates. A complete chronology of the events preceding the filing of the *Wilson complaint, and Mr. Veeder's role in the decision as to the scope of that lawsuit, is contained in a March 22, 1977 letter from Assistant Attorney General Peter R. Taft to Congressman Yates (Attachment C).*[9] The facts speak for themselves; the claims of fraud levelled by Mr. Veeder are baseless.

Because the Petition for Mandamus filed by Mr. Veeder is frivolous, this Court should award the United States its costs and fees in preparing this response. There is ample authority for imposing such a sanction where, as here, counsel has persisted in filing meritless pleadings.[10] As this Court explained in *Jaquette* v. *Black Hawk County, Iowa*, 710 F.2d 455, 462 (1983), "[a] court possesses several well-acknowledged inherent and statutory powers to levy sanctions against parties and their attorneys for abusive litigation practices." These powers include not only the power to dismiss a case with prejudice or to enter a default judgment, but also the power to assess costs and attorneys' fees "against an attorney personally" (*ibid.*). See also *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980) ("If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial process.").

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[9] This letter was attached to the Opposition to Omaha Tribe's Motion to Disqualify filed by the United States on December 20, 1985 (Appendix 3).

[10] Mr. Veeder is no stranger to the power of federal courts to impose appropriate sanctions. He was sanctioned by Judge McManus in this case for filing a Motion for Summary Judgment that was not "factually well grounded or legally warranted," in violation of Fed. R. Civ. P. 11 and 28 U.S.C. 1927 (Appendix 8 at 4). He was similarly sanctioned by the United States Claims Court in *White Mountain Apache Tribe of Arizona* v. *United States*, 4 Cl Ct. 575, 584 (1984), for the filing of pleadings without "good ground to support them * * *."

The filing of the petition for a writ of mandamus in this case can only be termed vexatious. The Court of Appeals for the Federal Circuit, in the recent decision of *In Re Oximetrix, Inc.*, 748 F.2d 637, 644 (1984), ordered sanctions against a litigant and its attorney in the course of rejecting a mandamus petition deemed to be frivolous in language that accurately describes Mr. Veeder's petition in the instant case:

> [T]here was not even a colorable basis for Oxco's present mandamus petition.
>
> Oxco's present petition confronted this court with a stack of documents more than a foot high and has consumed a substantial portion of the time of the Judges and staff of this court, all to reach a result [that should have been] obvious to Oxco and its counsel from the time at which the thought of mandamusing the district court first occurred.
>
> Oxco's petition * * * with no citation of apt authority or even minimally acceptable argument, * * * has succeeded, and could have succeeded, only in diverting substantial judicial resources from other, deserving litigants. Its sole effect is and could only have been to unnecessarily and vexatiously increase delay and costs * * * to the taxpayers who fund the operation of the judicial process.
>
> Thus, there is not and never was a basis * * * for the present petition. That circumstance was so clear in fact and law that competent counsel could not possibly have failed to recognized it. We are compelled to the conviction that the filing and maintenance of the present petition was based solely on a hope of delay [] * * * and that it was therefore frivolous.

The United States submits that Mr. Veeder's petition is frivolous and should be denied. Moreover, this Court should order Mr. Veeder to personally reimburse the United States for its costs and attorney's fees in responding to the petition.

Respectfully submitted,

PETER R. STEENLAND, JR.

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APPENDIX QQ

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 86-1717

In Re: Omaha Indian Tribe,

Petitioner,

PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF PROHIBITION

The Omaha Indian Tribe's petition for a writ of mandamus and/or writ of prohibition is denied as frivolous and totally without merit.

It is further ordered that the request of the United States for its costs and attorneys' fees in responding to the petition is granted. These costs and fees are imposed as a sanction against counsel for petitioner for filing a totally frivolous pleading.

The United States should file an itemized and verified bill of costs and statement of attorneys' fees within fourteen (14) days of the date of this order.

July 18, 1986

APPENDIX RR

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-2042-NI

Omaha Indian Tribe, *et al.*, *Appellants*, vs. Harold Jackson, *et al.*, *Appellees.*	Appeal from the United States District Court for the Northern District of Iowa

The post submission petition of the Omaha Indian Tribe suggestion for hearing en banc is denied.

The motion to recuse Chief Judge Lay from the opinion is denied.

BY THE COURT EN BANC.

July 18, 1988

Order Entered at the Direction of the Court:

Clerk, United States Court of Appeals, Eighth Circuit

6

No. 88-1426

Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

OMAHA INDIAN TRIBE,

Petitioner,

vs.

HAROLD JACKSON, ET AL.,

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT CO., ET AL.,

Respondents.

BRIEF FOR JOHN R. WILSON, ET AL. IN OPPOSITION

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No. 88-1426

In The

Supreme Court of the United States

October Term 1988

OMAHA INDIAN TRIBE,

Petitioner,

vs.

HAROLD JACKSON, ET AL.,

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR JOHN R. WILSON, ET AL. IN OPPOSITION

STATEMENT OF THE CASE

This case has been pending since 1975. It has been the subject of three reported opinions of the district court,

United States v. Wilson, 433 F.Supp. 57 (N.D. Iowa W.D. 1977) ["Blackbird Bend I"], *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa W.D. 1981) ["Blackbird Bend II"], *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa W.D. 1984) ["Blackbird Bend III"]; four opinions of the Eighth Circuit Court of Appeals, *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) ["Omaha I"], *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980) ["Omaha II"], *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982) ["Omaha III"], *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), and a full opinion of this Court, *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) ["Wilson"].

The Petitioner Omaha Indian Tribe[1] seeks review of the decision of the court of appeals in *Omaha IV*, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988). *Omaha IV* was a consolidation of separate appeals by the Tribe and the United States from the Final Judgment and Decree of the district court of May 29, 1987 as modified on June 30, 1987 (App.B p5a).[2] The Tribe's appeal was docketed in the Eighth Circuit Court of Appeals as *Omaha Indian Tribe v. Jackson*, No. 87-2042. The appeal of the United States was docketed as *United States v. Wilson*, No. 87-2191.[3] The Tribe was not a party to the appeal taken by

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[1] Petitioner will be referred to hereafter for convenience as the "Tribe."

[2] References to the Appendix to the Tribe's Petition will be to the Appendix Exhibit and page of the Appendix (App.___ p ___).

[3] The only issues raised by the United States in its separate appeal were with respect to the district court's disposition

(Continued on following page)

the United States, and the United States was not a party to the appeal taken by the Tribe. Respondents were parties, as appellees, to both appeals. The Tribe seeks review of so much of *Omaha IV* as decided the questions raised by the Tribe in its separate appeal.

This case involves a dispute over title to approximately 6,300 acres of farm land in an area known as "Blackbird Bend" on the Iowa side of the Missouri River, immediately opposite the Omaha Indian Reservation which lies on the Nebraska side. It began in 1975 with separate complaints by the Tribe and the United States as Trustee for the Tribe in the United States District Court for the Northern District of Iowa, Western Division (App.N p263a; App.O p269a). Both complaints sought recovery of the land as part of the Tribe's reservation. The Tribe claimed all of Blackbird Bend (and additional land not relevant here). The United States, as Trustee for the Tribe, claimed on behalf of the Tribe a smaller portion of

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(Continued from previous page)

of the improvements question. The United States was required to pay compensation for permanent improvements made by the Respondents to the land involved in this case as a precondition for obtaining a quiet title decree on behalf of the Tribe. The amount of compensation was stipulated between the United States and Respondents. The United States appealed from so much of the judgment as required the United States to pay interest on the amount of compensation from June 5, 1975, when the Respondents were dispossessed from the land, until the date of judgment. The United States also appealed from the district court's refusal to allow the United States to use, as a source of payment, the escrow fund into which the Tribe deposited crop proceeds during the pendency of the litigation.

land within Blackbird Bend known in this case as the "Barrett Survey Area" or simply the "Barrett Survey." The Barrett Survey contained approximately 2,900 acres and was indisputably part of the Tribe's reservation in the 1860s. The United States, however, excluded from its complaint approximately 700 acres of land within the Barrett Survey which had been patented in fee and conveyed free of trust status in the early nineteen hundreds.

The Omaha Indian Reservation was established in 1854 on the Nebraska side of the Missouri River by a treaty between the Tribe and the United States. The issue in the case was whether the movements of the Missouri River since 1854 (which resulted in the present location of the disputed land on the Iowa side of the river) destroyed the status of the land as reservation land. The Respondents, together with the State of Iowa, were the owners and occupants in 1975 of the land within the Barrett Survey.

In 1976 the district court entered two orders which defined the scope of the case, as it has since progressed through *Omaha IV*, by subject matter (the Barrett Survey) and by parties (the Tribe and the United States as Plaintiffs and the Respondents and the State of Iowa as Defendants). The first order (App.FF p395a) granted the Tribe's motion to consolidate its case with the case brought by the United States. The second order (App.GG p403a) severed the portion of the consolidated cases dealing with title to the Barrett Survey from the Tribe's claims to the larger Blackbird Bend area.

The outcome of the case turned on whether the river moved over the Barrett Survey by accretion or avulsion at

various times since 1854. The Tribe and the United States argued that the easterly and northerly movements of the river away from the Barrett Survey were accretive and that southerly and westerly movements of the river were avulsive with the result that the character of the land as reservation land remained unchanged. The Respondents argued that all the river movements were accretive, and that the westerly and southerly migration of the river destroyed the reservation land and replaced it with new land attaching to the Iowa bank of the river. The court of appeals in *Omaha IV* affirmed the Final Judgment and Decree of the district court (App.B p16a) entered on May 29, 1987 and modified in part on June 30, 1987. This Judgment and Decree was a final ruling on the title dispute within the Barrett Survey. It quieted title to approximately 1,900 acres in the United States as Trustee for the Tribe conditioned upon a reimbursement by the United States to the Respondents for improvements made to this land (which were agreed upon in amount); quieted title to approximately 670 acres in the State of Iowa; and quieted title to approximately 300 acres (the fee patent land) in the Respondents. The judgment did not dispose of any of the Tribe's claims to the remainder of Blackbird Bend.

In reaching its Judgment the district court applied the rules of decision laid down by this Court in *Wilson* and by the court of appeals in *Omaha II and III*. These included the following:

1. 25 U.S.C. §194[4] applied to shift the burden of proof to the Respondents, other than the State of Iowa, to prove the accretive nature of the river movements as these affected title to land within the Barrett Survey.

2. The Tribe had the burden of proving the avulsive nature of river movements as these affected title to lands claimed by Iowa.

3. The Tribe had the burden of proving the avulsive nature of river movements as these affected title to the area described by the fee patents.[5]

---

[4] 25 U.S.C. §194 states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) this Court said

> . . . §194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute" *Id.* at 668.

The "possession" and "title" which triggered the application was the undisputed fact that the Barrett Survey was part of the Omaha Reservation when it was established in 1854. *Wilson* also held, however, that the State of Iowa was not a "white person" within the meaning of Section 194 and that the statute did not, therefore, apply to Iowa.

[5] The court of appeals in *Omaha III, United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982) held that the fee patent land which, by issuance of the patents, left trust status was an area as to which the Tribe could not show the possession or title necessary under *Wilson* to trigger the application of 25 U.S.C. §194.

The district court concluded that, because of the speculative nature of the evidence of the river movements, "no party can meet its burden of proving accretion or avulsion," *Blackbird Bend III*, (App.A p5a, at p8a). Thus, Iowa retained the land claimed by it (670 acres). The Respondents retained the fee patent land (300 acres). And the United States and the Tribe prevailed on the balance of the Barrett Survey land (1,900 acres).

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The questions raised in the Tribe's Petition, through nine in number, fall into four categories: (1) the priority or adequacy of the United States' respresentation of the Tribe in the separate suit filed by the United States as Trustee for the Tribe, (2) the limitation of the Final Judgment and Decree to the Barrett Survey, (3) the sufficiency under Rule 52 F.R.C.P. of the district court's findings of fact, and the imposition upon the Tribe of the burden of proof as to the fee patent land, and (4) the propriety of allowing the United States the use of the escrow fund from farming operations as a source for reimbursement to the Respondents for the value of improvements. None of these questions merits review by this Court under any of the grounds set forth in Rule 17 of the Rules of the Supreme Court of the United States. The Tribe fails to show that the decision of the court of appeals was in conflict with the decision of another federal court of appeals, Rule 17.1(a) or with any decision of this Court, Rule 17.1(c). Nor does the Tribe demonstrate that there is

an important question of federal law which should be decided by this Court, Rule 17.1(c). The matters raised by the Tribe are limited to the peculiar circumstances of this case. They have no impact beyond this case.

ADEQUACY OF REPRESENTATION BY THE UNITED STATES

The Tribe's first three questions have to do with the refusal of the court of appeals to hear, or direct the district court to hear, the Tribe's allegations of "fraud" and misconduct on the part of the United States. The essence of the "fraud" charge seems to be that the limitation of the separate complaint of the United States to the Barrett Survey and its omission of any claim to the fee patent land consummated a "fraud" upon the Tribe.

Regardless of the merit, or lack thereof, of these charges, it is impossible to comprehend how the Tribe has been prejudiced by the fact that the United States has claimed a smaller area of land in its separate complaint than the Tribe has claimed. The Tribe has been represented throughout this litigation by counsel of its own choice, largely at the expense of the Bureau of Indian Affairs. As to the Barrett Survey, where the complaints of the Tribe and the United States overlapped, the Tribe was successful in recovering all but the Iowa and fee patent land. Under the 1976 severance order the Tribe retains all of its claims to lands outside of the Barrett Survey. These are yet to be tried.

The Tribe complained about the presence of the United States in the case prior to the trial in 1976, but no charges of fraud were raised by the Tribe in any of the

later appeals or proceedings until the Tribe filed a Motion on November 7, 1985 to have the attorneys for the United States disqualified (App.U p321a).

The court of appeals refused in *Omaha IV* to consider the Tribe's fraud charges stating:

> In this appeal, the Tribe also maintains (1) that the Department of Justice attorneys engaged in fraud and collusion in their representation of the United States as trustee for the Tribe. . . . We find these claims to be without merit.
>
> The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976. However, the Tribe failed to again raise the issue until 1985 even though the case had been reviewed once by the Supreme Court and three times by this court. At that time, the district court held that the Tribe's motion to disqualify the government attorneys was "clearly untimely and merits no serious attention or consideration." The Tribe subsequently petitioned this court for a writ of mandamus alleging the same charges. This court not only dismissed the Tribe's petition as "frivolous and totally without merit" but also awarded the United States costs and attorney's fees as sanctions against counsel for the Tribe for filing "a totally frivolous pleading." *In Re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus). In view of the foregoing, this court unequivocally determined prior to oral argument that it would not entertain this meritless issue. (App.C p37a, at p40a)

LIMITATION OF JUDGMENT TO BARRETT SURVEY

The Tribe's fourth and fifth questions claim error by the lower courts in not extending the judgment in favor of the United States and the Tribe inside the Barrett Survey to lands claimed separately by the Tribe outside

the Barrett Survey in the larger Blackbird Bend area. The Tribe's argument is adequately answered by the court of appeals in footnotes 5 and 6 to its opinion in *Omaha IV* (App.C p37a, at pp44a, 48a). The points made in these footnotes are that:

1. The parties and subject matter of this case were defined by the 1976 consolidation and severance orders. As so defined, the case progressed, without objection by the Tribe, to trial and through all of the many appeals following trial.

2. The Tribe will have to carry the burden of proof in establishing its claims outside the Barrett Survey, since 25 U.S.C. §194 would not apply outside the Barrett Survey to shift that burden to the landowners.

3. There are landowners who, because of the severance order, did not participate in the trial of the Barrett Survey portion of this case and whose rights would be denied if the judgment in favor of the Tribe were extended outside the Barrett Survey.

4. The Barrett Survey portion of the case has proceeded as an equitable quiet title action. The Tribe's claims outside the Barrett Survey will be an action at law for ejectment, and the affected landowners may have the right to trial by jury.

RULE 52 F.R.C.P. AND ALLOCATION OF THE BURDEN OF PROOF ON FEE PATENT LAND

The Tribe's sixth question takes issue with the refusal by the court of appeals to require the district court to adopt more extensive findings of fact. The facts of this

case were detailed by the district court in *Blackbird Bend I and II* and were reviewed by the court of appeals at length in *Omaha I, II and III* and by this Court in *Wilson*. It was not necessary that the district court adopt additional findings in *Blackbird Bend III*. The court of appeals stated:

> . . . findings of fact 'are adequate if they afford a reviewing court a clear understanding of the basis of the trial court's decision. *Lynch Corp. v. MII Liquidating Co.*, 717 F.2d 1184, 1187 (8th Cir. 1983)', *Omaha IV*, (App.C p37g, at p42a).

The court concluded that the findings in *Blackbird Bend III* were adequate for purposes of its review.

The Tribe in its seventh and eighth questions challenges the imposition of the burden of proof on the Tribe in its claims to the fee patent land. This burden was imposed by the court of appeals in *Omaha III*. The court in *Omaha III* followed the "area" analysis of this Court in *Wilson*, and held that 25 U.S.C. §194 would not apply within the area described by the fee patents since this area, by virtue of these patents, was removed from reservation and trust status, and the prior possession and ownership necessary to trigger the application of 25 U.S.C. §194 was, therefore, lacking. The court of appeals in *Omaha III* directed the district court to review the evidence to determine whether the Tribe could sustain the burden of proof of the nature (avulsive or accretive) of all river movements necessary to its claim to the fee patent land. This was the same burden of proof that the Tribe had to carry against the State of Iowa to whom 25 U.S.C. §194 did not apply. The district court in *Blackbird Bend III* followed the *Omaha III* mandate and concluded that the Tribe, without the aid of 25 U.S.C. §194, could not

sustain its burden of proof against Iowa nor could it sustain its burden of proof with respect to the fee patent land. The court of appeals in *Omaha IV* affirmed on the basis that the district court correctly carried out the *Omaha III* mandate and that its findings were not clearly erroneous.

USE OF ESCROW FUNDS BY UNITED STATES

The court of appeals in *Omaha III* held that the United States as Trustee for the Tribe would be required to reimburse the Respondents for the value of the permanent improvements which they and their predecessors made to the land. The Final Judgment and Decree of the district court determined the amount due as reimbursement based upon stipulations entered into by the Respondents and the United States. In the modification to its Final Judgment and Decree, the district court refused to allow the United States access to escrow funds from the Tribe's farming operations on the Barrett Survey land as a source of payment.[6] The court of appeals reversed on this point holding that the United States could use this fund. The court applied general common law principles to the effect that a trustee is entitled to reimbursement from a trust estate for expenses incurred for the benefit of the trust beneficiary. *Omaha IV* (App.C p44a)

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[6] The Tribe was placed in possession of the Barrett Survey land in 1975 at the inception of the case by a preliminary injunction (App.M p256a). The order granting the injunction required all net profits from farming operations to be deposited with the clerk of court pending final judgment.

CONCLUSION

None of the actions taken by the court of appeals and complained of by the Tribe is such as to warrant review by this Court. There is no issue of federal law, or its application, which merits the attention of this Court. The Tribe's Petition For a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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No. 88-1426

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

v. *Petitioner,*

HAROLD JACKSON AND OTIS PETERSON AND THE DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Respondents.

* * * *

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES OF AMERICA (10 STAT. 1043), ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

v. *Petitioner,*

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, AND LUEA SORENSON; STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L., HAROLD, AND LUEA SORENSON; STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents State of Iowa and the Iowa Department of Natural Resources respectfully oppose the Petition of the Omaha Indian Tribe for a Writ of Certiorari to review the opinion of the Court of Appeals for the Eighth Circuit entered on August 12, 1988.

OPINIONS BELOW

There are nine reported opinions in this litigation, an unreported order of the Court of Appeals, and the District Court's unreported Final Judgment and Decree dated May 29, 1987 (Pet. App. p. 16a), which was amended by Order dated June 30, 1987 (Pet. App. p. 31a).

The opinions and orders, in chronological order, are as follows: *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977) (memorandum and opinion) [*Blackbird Bend I*] (Pet. App. p. 189a); *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977) (findings of fact) [*Blackbird Bend I*] (Pet. App. p. 205a); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) [*Omaha I*] (Pet. App. p. 135a); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) [*Omaha II*] (Add. p. A-1); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981) [*Blackbird Bend II*] (Pet. App. p. 52a); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert. denied* 465 U.S. 1025 (1984) [*Omaha III*] (Pet. App. p. 92a); *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) [*Blackbird Bend III*] (Pet. App. p. 5a); *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) [*Omaha IV*] (Pet. App. p. 37a); *In Re: Omaha Indian Tribe*, No. 86-1717 (8th

(Pet. App. p. 461a); Final Judgment and Decree entered May 29, 1987 (Pet. App. p. 16a); Order entered June 30, 1987 (Pet. App. p. 31a).

The Court of Appeals and the parties have referred to the four decisions of the Court of Appeals as *Omaha I, II, III,* and *IV*. The three decisions of the trial court have been referred to as *Blackbird Bend I, II,* and *III*.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its opinion on August 12, 1988. (Pet. App. p. 37a). A petition for rehearing en banc was denied on November 10, 1988 (Pet. App. p. 49a), and the Tribe's Petition for Writ of Certiorari was filed within the time period as extended by this court by order of January 18, 1989 (Pet. App. p. 50a). The Petition invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

United States Code, Title 25 Section 194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

The Omaha Indian Tribe seeks review of a decision of the Court of Appeals for the Eighth Circuit finally resolving the ownership of lands along the Missouri River in Iowa. *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988) (*Omaha IV*) (Pet. App. p. 37a). In *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. p. 107a), this Court addressed the applicability of 25 U.S.C. § 194 to this accretion - avulsion dispute. Although holding that 25 U.S.C. § 194 placed the burden of persuasion on private defendants to establish ownership of the area previously within the reservation, this Court held that section 194 did not apply to the Tribe's claims against the State.

After *Wilson*, the Court of Appeals held that private defendants failed to overcome the presumption of title imposed by section 194 as to "trust lands" – lands which were within the reservation when the river movements occurred. *Omaha II* (Add. p. A-17). The final judgment quiets title in the United States as trustee for the Tribe to these 1900 acres.

The trier of fact found that, absent the benefit of section 194, the Tribe failed to prove that the river moved west by avulsions, an essential predicate to its claim that it owns this land on the Iowa side of the river. The Tribe therefore lost as to the lands claimed by the State and also as to the area which had been conveyed out of trust (the "fee patent lands"). *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) (*Blackbird Bend III*) (Pet. App. p. 5a), *aff'd Omaha IV* (Pet. App. p. 37a).

The United States as trustee for the Omaha Indian Tribe filed suit on May 19, 1975, seeking to quiet title to

approximately 2900 acres of land located in Iowa adjacent to the Missouri River in Blackbird Bend. (Pet. App. p. 263a). The government claimed the land was formerly part of the Omaha Indian Tribe Reservation as surveyed by T. H. Barrett in 1867. On October 6, 1975, the Omaha Indian Tribe filed its own petition seeking to quiet title to the same area and to an additional 3490 acres in Blackbird Bend. (Pet. App. p. 269a). After the suits were consolidated at the Tribe's request, the District Court severed that portion of the Tribe's suit which concerned land outside the Barrett Survey. Order of January 26, 1976 (Pet. App. pp. 395a, 401a); Order of April 5, 1976 (Pet. App. pp. 403a-405a).

The Tribe claims ownership of the land east of the Missouri River on the theory that this land was long ago cut off from the Tribe's west bank reservation by a series of avulsions. The State and private defendants presented evidence that the river moved by accretion. After trial, the District Court found that the river moved west by accretion and entered judgment for the defendants. *Blackbird Bend I* (Pet. App. pp. 205a, 242a-243a). The Court of Appeals reversed, concluding that federal law applied and that 25 U.S.C. § 194 shifted the burden of persuasion to all defendants. *Omaha I* (Pet. App. pp. 135a, 151a-155a).

This Court reversed, holding that federal law should borrow Nebraska property law. *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 107a, 132a). This Court agreed that the Tribe could establish prior possession or ownership for purposes of 25 U.S.C. § 194 by showing that the *area* within the Barrett Survey was in the reservation prior to the river movements. (Pet. App. p. 123a). However, this Court held that the State of Iowa was not a "white

person" and could not be handicapped by the application of 25 U.S.C. § 194. (Pet. App. pp. 121a-122a, 132a).[1]

On remand the Court of Appeals determined that the private defendants did not meet their burden of persuasion to overcome the Tribe's presumption of ownership under 25 U.S.C. § 194. *Omaha II* (Add. p. A-17). While the Court of Appeals concluded that the Tribe's evidence of avulsive chute or neck cut-offs did not equally balance the defendants' proof, it held that section 194 precluded any consideration of inferences drawn from these and other weaknesses in the Tribe's proof of avulsions. (Add. p. A-17). The Court specifically excepted the State of Iowa from its holdings. (Add. pp. A-17-A-18). The Tribe's claim against the State was severed and remanded to allow the Tribe "to point out specific evidence relied upon to show avulsions on the particular land claimed by the State." (Add. p. A-18).

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[1] The Petition erroneously states that in *Wilson* this Court upheld the "Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. § 194." (Pet. p. 3, n.6). The Tribe further claims that this Court's decision "affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. § 194." (Pet. p. 3, n.6). In fact, this Court vacated the opinion of the Court of Appeals in *Omaha I* on several grounds. First, this Court held that the State of Iowa was not a "white person" for purposes of 25 U.S.C. § 194 and that 25 U.S.C. § 194 did not apply to the State. (Pet. App. pp. 121a, 132a). Second, this Court held that the Court of Appeals erred in "arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion." (Pet. App. pp. 126a-127a, 132a). The Court of Appeals' judgment was vacated and remanded for further proceedings. (Pet. App. p. 132a).

Although the District Court concluded that the evidence established that the river moved by accretion at all critical times, it held that the Court of Appeals' findings applying a different burden of proof conclusively determined, as against the State, that the Tribe owned eastern trust lands and all accretions. (Pet. App. pp. 83a-84a). Although the Tribe had never proved its avulsions against the State, the District Court quieted title in the plaintiffs to the entire Barrett Survey area. *Blackbird Bend II* (Pet. App. pp. 83a-84a).

The Court of Appeals reversed. *Omaha III* (Pet. App. p. 92a). It held the District Court's decision was inconsistent with its mandate and allowed "the Tribe to bootstrap section 194 in asserting its claim against the state." *Omaha III* (Pet. App. p. 99a). The Court of Appeals instructed the District Court to determine whether the Tribe had met its burden of proof as to the State and fee patent lands. (Pet. App. pp. 101a-103a). As to those lands, *Omaha III* required the Tribe to bear the burden of proving that the critical westward river movements from 1879 to 1923 were avulsive. (Pet. App. pp. 100a-102a). The Court of Appeals recognized the difficulty the party having the burden of proof might face and also recognized that it was likely "the Tribe will prevail only as to the trust lands formerly in possession of the private defendants, but not as to the remainder." (Pet. App. p. 103a).

The District Court on January 13, 1984, held that the Tribe failed to carry its burden of proving that the river's westward movements were avulsive. (Pet. App. pp. 11a-12a). The District Court quieted title in the State to the land it claimed and in the private landowners to fee patent lands. (Pet. App. pp. 12a-14a).

Starting in November 1985, the Tribe filed repetitive motions alleging that Justice Department attorneys defrauded the Tribe out of its land in Blackbird Bend by limiting its complaint to the trust land within the Barrett Survey. (Pet. App. pp. 321a, 276a). (The Tribe filed its own more expanded complaint and has been represented by its own counsel throughout this litigation.) The Court of Appeals dismissed the Tribe's petition for a writ of mandamus based on the alleged fraud, concluding that the petition was frivolous and without merit and awarding sanctions. *In Re: Omaha Indian Tribe* (Pet. App. p. 461a).

On May 29, 1987, the District Court entered its Final Judgment and Decree quieting title in the respective parties. (Pet. App. p. 16a). The decree was amended by order filed June 30, 1987, in which the District Court denied the government use of the escrow funds to satisfy its obligation to pay the private landowners for improvements. (Pet. App. pp. 34a-36a). The Court of Appeals affirmed the District Court's decision quieting title in the State and private landowners and reversed the District Court's decision as to the escrow funds. *Omaha IV* (Pet. App. pp. 42a-47a).

The Tribe's petition for rehearing en banc was denied on November 10, 1988 (Pet. App. p. 49a).

SUMMARY OF ARGUMENT

Petitioner has made no attempt to establish a reason for granting the writ. Instead the petition re-argues case-specific procedural and factual issues which have been

decided adversely to Petitioner by both the District Court and the Court of Appeals. There is no conflict in the lower courts or significant issue of law raised by the petition.

The petition is an untimely attack on procedural rulings made in 1976 – prior to the trial of this case and prior to a decision by this Court and four rulings by the Court of Appeals. Petitioner did not raise the "fraud" issue or attack the severance order in its initial appeal to the Court of Appeals in 1977. These issues were raised on the last remand only after Judge Bogue in January 1984 finally determined the ownership of the State and fee-patent lands. Petitioner has waived these issues, and no benefit would flow from Supreme Court review.

The Tribe's claims are dependent upon proof that the Missouri River jumped west by avulsion, leaving reservation land in place. The District Court found that the Tribe did not prove these avulsions. That finding was affirmed by the Court of Appeals, and the Tribe cannot show that this was clearly erroneous. The Tribe seeks to avoid the failure of its proof by bootstrapping its victory against private defendants in *Omaha II*. This Court has already determined that 25 U.S.C. § 194 shifts the burden of proof to private defendants, but not to the State. *Wilson v. Omaha Indian Tribe* (Pet. App. p. 132a). The Tribe's victory against the private defendants in *Omaha II* was based on a different burden of proof and cannot be given binding effect against the State. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972). The Court of Appeals correctly held that the Tribe's position is contrary to the mandate in *Omaha II* and is an improper attempt to bootstrap findings based on section 194 so as to apply

that statute against the State. *Omaha III* (Pet. App. p. 102a); *Omaha IV* (Pet. App. pp. 40a-42a).

The petition contains many errors. The Court should not rely on the description of the proceedings contained therein.

The decisions below were clearly correct.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO HEAR THE "FRAUD" ISSUE AS THAT ISSUE WAS NOT PROPERLY PRESERVED, HAS BEEN REJECTED BY THE COURTS BELOW AS FRIVOLOUS, AND WOULD NOT PROVIDE A GROUND FOR RELIEF FROM THE JUDGMENT, EVEN IF TRUE.

The Tribe claims that the United States Department of Justice fraudulently denied it title to 700 acres by excepting the land from its complaint. (Pet. p. 18). This claim was properly rejected by the District Court and Court of Appeals as wholly frivolous and without merit. (Pet. App. pp. 40a, n.4, 363a-366a, 461a).

The United States claimed only the "trust lands" within Blackbird Bend. This included the area which was once within the Omaha reservation (the Barrett Survey) except land which had been conveyed in fee to individuals prior to the river movements in question. (Pet. App. pp. 95a, 188a, n.70, 209a). This Court recognized the same distinctions in *Wilson v. Omaha Indian Tribe,* in holding that 25 U.S.C. § 194 applied to the area which had been in the reservation (the Barrett Survey) (Pet. App. p. 123a),

and in recognizing that state law would apply to claims where the United States has patented lands to private owners (Pet. App. p. 125a).

The more narrow scope of the United States' complaint has not precluded the Tribe from filing its own lawsuit, which claims 6390 acres in Blackbird Bend. (Pet. App. p. 269a). The Tribe independently presented its own case at trial. Its claim to lands outside the Barrett Survey is still pending. *Omaha IV* (Pet. App. p. 48a, n.6).

The determinative factor as to ownership in this litigation has been the applicability of section 194, not whether the United States claimed the land. Because of 25 U.S.C. § 194 and this Court's ruling in *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 123a, 132a), private defendants were forced to bear the burden of proof concerning trust lands within the reservation (the Barrett Survey). Section 194 does not, however, apply to lands claimed by the State, which is not a "white person." *Wilson v. Omaha Indian Tribe* (Pet. App. pp. 121a-122a, 132a). Section 194 applies only if the Tribe makes out a presumption of title by establishing previous possession or ownership. It does not apply where the United States granted fee patents to individuals. The Tribe was therefore compelled to bear the burden of proof as to the State and the fee-patent lands. *Omaha III* (Pet. App. pp. 100a-103a). The Tribe was not able to meet this burden of proof. *Blackbird Bend III* (Pet. App. pp. 11a-12a). The Tribe therefore lost as to the fee-patent lands and the State lands within the Barrett Survey. Both the District Court and the Court of Appeals recognized that the placement of the burden of proof, and

not whether the United States claimed the land, determined the outcome of this case. (Pet. App. pp. 15a, 40a-44a, 96a-103a).

The District Court quite properly held that the Tribe's attempts to raise the "fraud" issue in 1986 and 1987 were untimely. Order of April 1, 1987 (Pet. App. p. 431a). The Tribe filed a request for a protective order based upon alleged improper representation by the Justice Department on September 3, 1976. (Pet. App. p. 407a). The Court granted the Tribe's request that it have independent procedural rights (Pet. App. pp. 416a-418a) but denied its motion to separate the United States' claim for trial. Order of October 26, 1976 (Pet. App. p. 417a). The Tribe did not raise this issue in its initial appeal to the Eighth Circuit or in subsequent appeals. Order of April 1, 1987 (Pet. App. p. 431a). This issue was resurrected eight years after trial and only after Judge Bogue's decision on the last remand. That the fraud issue provides no ground for relief against these defendants is further shown by the fact that the Tribe raised this issue by a motion to have Justice Department attorneys disqualified (Pet. App. pp. 321a-328a), and then by a motion for summary judgment against named Justice Department attorneys. (Pet. App. pp. 276a, 285a). The Tribe then filed repeated motions under the rubric of motions to strike surveys, motion to have the Court disqualify itself, etc.[2]

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[2] See docket entries 624, 635, 639, 645, 658, 669, 675, 681, and 683. Note that the judge hearing these motions and personally accused of "consummating the fraud" was the Honorable Edward J. McManus. The Honorable Andrew Bogue heard the case and ruled on the merits, not Judge McManus.

Both the District Court and the Court of Appeals concluded that the Tribe's fraud charges were wholly frivolous and without merit. Order, February 21, 1986 (Pet. App. pp. 364a-366a); *In Re: Omaha Indian Tribe* (Pet. App. p. 461a).

The Tribe's fraud claim is not credible. It claims that it was fraud for United States Attorney Evan Hultman to file the complaint on behalf of the United States because Hultman was Attorney General for Iowa in 1965 when the State settled a quiet-title suit between itself and private defendants in this same area. (Pet. p. 7). The Tribe has not shown how this previous settlement affected the Tribe's claim in this case. Further, the Tribe itself claims that the United States' complaint was prepared by Deputy Attorney General Myles Flint, not Hultman. (Pet. p. 11). The Tribe erroneously states that the 700 acres excepted from the United States' complaint were identical to the lands obtained by the State in settlement of the 1965 state court lawsuit. (Pet. p. 14). Instead the United States' complaint excepted lands which had been conveyed out of trust by fee patents. (Pet. App. pp. 188a, n.70, 209a).

As the Ninth Circuit Court of Appeals stated in addressing similar claims by Mr. Veeder that the United States Department of Justice was "fraudulently representing" a Tribe, the Tribe's remedy where it is dissatisfied with Justice Department representation is to intervene and forcefully present its own position. *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924 (9th Cir. 1986). Here the Tribe presented its own case, and there is no basis for reversing the judgment simply because the United States filed a more narrow complaint than did the Tribe.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE 1976 PRE-TRIAL ORDER WHICH PROVIDED THAT TITLE TO LAND WITHIN THE BARRETT SURVEY WOULD BE TRIED SEPARATELY FROM TITLE TO LAND OUTSIDE THE ORIGINAL RESERVATION.

In April 1976 the District Court determined that claims to the area once within the reservation would be tried separately from ownership of the area outside the Barrett Survey. (Pet. App. p. 405a). The Tribe now claims that this Court should award it title not only to all 2900 acres within the Barrett Survey but also to an additional 3490 acres. Ownership of the land outside the Barrett Survey has not been tried.

The District Court's Findings of Fact explained the reasons for trying these portions separately:

> . . . the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable . . . .

(Pet. App. p. 208a). (*See also* Pet. App. p. 405a).

The Tribe did not challenge the April 5, 1976, severance order on appeal. (Pet. App. p. 44a, n.5). It therefore waived any objections to the ruling establishing the order in which these proceedings would be tried.

To permit the Tribe to expand the scope of the trial after the fact would deny due process. Other parties who claim land outside the Barrett Survey did not participate in the trial of claims within the Barrett Survey. Order, Nov. 8, 1984 (Add. p. A-20). Further, the defendants within the Barrett Survey are entitled to a jury trial outside the survey area. Order, August 8, 1988 (Add. pp. A-25-A-26).

The Tribe's argument also ignores the different burdens of proof which apply to each area. The Tribe has the burden of proof on lands outside the Barrett Survey and cannot rely on 25 U.S.C. § 194 to shift that burden to the defendants. *Omaha I* (Pet. App. p. 187a, n.69). The Tribe prevailed on its claims to trust lands against private defendants solely because those defendants were forced to bear the burden of persuasion under 25 U.S.C. § 194. *Omaha III* (Pet. App. pp. 95a-96a, 101a). Findings in favor of the Tribe applying 25 U.S.C. § 194 cannot be given binding effect in portions of the proceedings where the Tribe has the burden of proof. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234-236 (1972); *Omaha III* and *Omaha IV* (Pet. App. pp. 48a, n.6, 99a). Further, the preclusive effect, if any, to be given the judgment in the first portion of the litigation is to be determined by the court in the second portion of the litigation – after discovery of the basis of the Tribe's claim to land outside the Barrett Survey.

III. THE COURT OF APPEALS CORRECTLY HELD IN *OMAHA III*, 707 F.2d 304 (8th CIR. 1982), THAT FINDINGS BASED ON 25 U.S.C. § 194 WERE NOT BINDING AGAINST THE STATE, TO WHOM SECTION 194 DOES NOT APPLY.

The Tribe's lawsuit depends on the conclusion that the Missouri River always moved east in Blackbird Bend by accretion, thus adding land to the reservation, and always jumped back west by avulsion. (Pet. App. pp. 210a-211a). The only basis on which the Tribe can claim any of this land is by establishing that the river moved away from the Iowa high bank by avulsion.

The trial judge concluded that the river always moved by accretion. *Blackbird Bend I* (Pet. App. pp. 242a-244a). After this Court's decision in *Wilson* (Pet. App. p. 107a), the Court of Appeals reversed as to the private defendants. It held that the private defendants could not overcome the presumptive Indian title created by section 194 even though the Tribe's "[e]vidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof . . . " *Omaha II* (Add. p. A-17). Where section 194 applied, the Court of Appeals held that the Tribe prevailed even without proof that the alleged avulsions left any identifiable land in place. *Omaha II* (Add. p. A-13).

The Tribe claims that its victory in *Omaha II* requires that it also prevail as to the State lands and the fee-patent lands. The trier of fact, however, found that the Tribe did not prove that the river moved by avulsion, and the Court of Appeals affirmed this finding. *Blackbird Bend III*;

Omaha IV (Pet. App. pp. 11a-12a, 42a-44a). The Court of Appeals properly rejected the Tribe's attempt to bootstrap section 194 onto the State's claims in *Omaha III* and *Omaha IV* (Pet. App. pp. 40a, n.4, 99a).

This Court held in *Wilson v. Omaha Indian Tribe* that section 194 does not operate against the State of Iowa. (Pet. App. pp. 121a, 132a). The findings in *Omaha II* could not be given preclusive effect against the State because *Omaha II* was based upon a different burden of proof. A finding against other parties based on a different burden of proof cannot be given binding effect against the State. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Omaha III* (Pet. App. pp. 99a-100a); *Omaha IV* (Pet. App. p. 48a).

Further, the Court of Appeals has twice explained that its decision in *Omaha II* did not establish that the Tribe proved its case, as the Tribe claims. *Omaha III* (Pet. App. pp. 101a-102a); *Omaha IV* (Pet. App. p. 43a). Instead the decision against private defendants was based entirely on the presumption of title created by section 194. (Pet. App. pp. 101a-102a).

The petition for certiorari is misleading when it states that the District Court's second decision in this case held that the Tribe met its burden of proof even without the benefit of section 194. (Pet. p. 3, n.6). What the District Court held in *Blackbird Bend II* was that the Tribe need not prove the avulsions to recover against the State because of the holding in *Omaha II*. (Pet. App. pp. 56a, 83a-84a). The District Court expressly remained convinced, however, that the river had never moved by avulsion, an essential predicate to the Tribe's theory.

Blackbird Bend II (Pet. App. pp. 83a-84a). The Court of Appeals reversed, holding that the District Court misconstrued the mandate in *Omaha II*. *Omaha III* (Pet. App. pp. 99a-100a). The Court of Appeals held that the Tribe could not "bootstrap" its victory under section 194 to avoid establishing all elements of its case against the State, or upon fee-patent lands. *Omaha III* (Pet. App. pp. 99a-103a). On remand, the District Court squarely held that the Tribe failed to meet its burden of persuasion, and the Court of Appeals affirmed. *Blackbird Bend III; Omaha IV* (Pet. App. pp. 11a-12a, 41a-44a).

IV. THE DISTRICT COURT'S DECISION, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS NOT CLEARLY ERRONEOUS.

Petitioner's claim that the District Court's findings, affirmed by the Court of Appeals, were clearly erroneous provides no reason to grant its petition.

The trial court heard six weeks of trial. The District Court reviewed the evidence on three occasions and each time determined that the Tribe had not established its theory that the Missouri River moved by avulsion during the critical time periods. *Blackbird Bend III* (Pet. App. pp. 11a-12a); *Blackbird Bend II* (Pet. App. pp. 83a-84a); *Blackbird Bend I* (Pet. App. pp. 242a-244a). The Court of Appeals, which has reviewed this case on four occasions, upheld the District Court's determination that the Tribe failed to carry its burden of proof as to the State and fee patent lands. *Omaha IV* (Pet App. pp. 42a-44a).

In reviewing trial court decisions claimed to be "clearly erroneous" under Fed. R.Civ. P. 52(a), this Court

has consistently emphasized the degree of deference to be given trial court's findings. *Andersen v. Bessemer City*, 470 U.S. 564, 573-574 (1985). *See also Amadeo v. Zant*, 486 U.S. ___, 108 S.Ct. 1771 (1988). The Court of Appeals applied the correct legal standard and upheld the trial court findings. The decision below is clearly correct.

This Court is a court of law "rather than a court for correction of errors in fact finding." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Review of fact findings is primarily the function of the courts of appeals. The Court of Appeals for the Eighth Circuit has appropriately carried out that function. This Court has previously stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.). It is apparent that the petition seeks to embroil this Court in case-specific review of facts. Granting the writ would be an unwarranted use of the limited resources of this Court.

CONCLUSION

For the reasons set forth above, Respondents State of Iowa and the Iowa Department of Natural Resources respectfully request that this Court deny the Tribe's Petition for a Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 77-1384, 77-1387

No. 77-1384

Omaha Indian Tribe, Treaty of 1854 with the United States (10 Stat.1043), Organized pursuant to the Act of 6/18/34 (48 Stat.984; 25 USC 476) as amended, Appellant, v. Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, The State of Iowa, Darrell L., Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa, Appellees.	Appeal from the United States District Court for the Northern District of Iowa.

No. 77-1387

United States of America, Appellant, v. Roy Tibbals Wilson, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, and the State of Iowa, Appellees.	*	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: June 13, 1977

Filed: January 15, 1980

Before LAY, Chief Judge,* STEPHENSON and HENLEY, Circuit Judges.

LAY, Chief Judge.

These cases have been remanded to us by the United States Supreme Court for reconsideration in light of the principles set forth in its June 20, 1979 opinion. *Wilson v. Omaha Indian Tribe*, 99 S.Ct. 2529 (1979).

*Judge Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

I. *Factual Background.*

At issue is ownership of approximately 2,900 acres of land lying adjacent to the Missouri River in an area called Blackbird Bend located in what was then the Territory of Nebraska, and which is conceded to have been set aside in 1854 by treaty as a reservation for the Omaha Indian Tribe. The tortured history of the land dispute and attendant controversy over the nature of the early movements of the Missouri River is fully set forth in the district court's opinion, 433 F. Supp. 67 (N.D. Iowa 1977), as well as in this court's previous decision, 575 F.2d 620 (8th Cir. 1978). This court reversed the district court's judgment in favor of the defendants and against the Tribe. We did so for two reasons: (1) We held the district court failed to apply federal law rather than state law in regard to burden of proof, 25 U.S.C. § 194, and substantive law concerning accretion and avulsion; and (2) we found the proof of accretion adduced by defendants was conjectural and speculative and defendants failed to meet the requisite burden.

The Supreme Court granted certiorari, confining its review to the applicability of 25 U.S.C. § 194, and whether federal or state law should have been employed to determine the substantive issue of river movement.

Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable and placed both the burden of going forward with the evidence and of persuasion upon the defendants.[1] The statute reads:

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[1] The Court held 25 U.S.C. § 194 did not apply to land claimed by the State of Iowa, because a sovereign could not be construed to be a "white person" within the meaning of the Statute. *Wilson v. Omaha Indian Tribe,* 99 S.Ct. 2529, 2537-38 (1977).

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

The Court also agreed that the Tribe's right to the property depended upon federal law, " 'wholly apart from the application of state law principles which normally and separately protect a valid right of possession,' " 99 S.Ct. at 2539 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974)). Nonetheless, the Court held the legal standard to be employed in determining whether accretion or avulsion occurred, absent any boundary dispute or other need for a uniform federal rule, should be borrowed from applicable state property law, in this case the law of the State of Nebraska. 99 S.Ct. at 2543.

II. *Nebraska Law.*

On review of the governing principles of state law, we hold the district court's interpretation of Nebraska law was incorrect, and adhere to our prior opinion that all parties making claim against the Tribe, with the exception of the State of Iowa, demonstrated only speculative and conjectural evidence of their right to have title to the reservation land, which was granted to the Tribe by the Treaty of 1854, quieted in them. We hold that those parties failed to sustain the burden of proof placed upon

them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe.[2]

Our disagreement with the district court was with its broad definition of accretion and correspondingly narrow definition of avulsion. We stated:

> The trial court . . . held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion.

575 F.2d at 639.

We also held the district court erroneously placed the burden of proof on the Tribe, although it did not give defendants the benefit of a presumption of accretion. *Id.* at 633. The result was that defendants received the benefit of any favorable inferences from sketchy proof of avulsion: what was not clearly proved avulsive must, in the district court's view, be the result of accretion.

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[2] The Supreme Court stated we found the evidence was in "equipoise." 99 S.Ct. at 2535. We recognize the Court could have reasonably concluded we found the evidence evenly balanced from our statement that "defendants have failed in sustaining their burden of proof under § 194." Nevertheless, we did not intend to convey that assessment of the weight of the evidence. Nor do we here; rather, we adhere to our prior holding that defendants failed to meet their burden because their "case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved." *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 650 (8th Cir. 1978).

The Supreme Court's decision makes it clear that defendants shoulder the burden of persuasion on the question of whether the Tribe is no longer entitled to possession of the area which was in the past part of its reservation. To quiet title in themselves, defendants must show the strength of their title; they must prove by a preponderance of the evidence that the River changed by the process called accretion. Thus they do not have the advantage, as they did under the trial court's reasoning, of inferences drawn from any weaknesses in evidence tending to show avulsion. *See Mitchell v. Beermann*, 175 Neb. 616, 620, 122 N.W.2d 525, 527 (1963); *Jones v. Schmidt*, 170 Neb. 351, 355, 102 N.W.2d 640, 644 (1960); *De Long v. Olsen*, 63 Neb. 327, 329, 88 N.W. 512, 513 (1901).

Upon examination of Nebraska case law, we conclude Nebraska adheres to the common law principles governing avulsion and accretion set forth in our earlier opinion.[3] Federal and Nebraska law do not differ substantially in the basic definition of the terms, perhaps

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[3] We note the district court, as well as the original briefs of each of the defendants, the Government and the Tribe expressed the opinion that Nebraska law governing accretion and avulsion was not substantially different from federal law. While we still disagree with the district court's failure to use federal law in allocating the burden of proof, it is now decided that governing substantive rules are not drawn from the federal common law. With the case in this changed posture, we agree with the district court's statement that, as to definitions of accretive and avulsive movement of the Missouri River, there is no significant difference between federal and Nebraska law relevant to this case. *United States v. Wilson*, 433 F. Supp. 57, 65 (N.D. Iowa 1977).

because of the shared origin of the common law principles in Roman and early English law. Our prior analysis, commencing with early definitions from the Institutes of Justinian through the early United States Supreme Court cases including *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1870); *Jefferies v. East Omaha Land Co.*, 134 U.S. 178 (1890); *Nebraska v. Iowa*, 143 U.S. 359 (1892), and this court's decisions in *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918); *Commissioners of Land Office v. United States*, 270 F. 110 (8th Cir. 1920), *appeal dismissed*, 260 U.S. 753 (1922), finds full accord in Nebraska case-law. Nearly all the earlier Nebraska cases we have examined rely upon these and other early federal cases for definitions of accretion and avulsion.

The early United States Supreme Court cases of *Mayor, Alderman & Inhabitants of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836) and *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874), were cited as rules of decision and quoted in the early Nebraska case of *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894), and also in *Frank v. Smith*, 138 Neb. 382, 293 N.W. 329 (1940). As the Nebraska Supreme Court stated in *Lienmann v. Sarpy County*, 145 Neb. 382, 392, 16 N.W.2d 725, 729 (1944), citing several representative cases, it "has repeatedly followed the rules of law as stated in State of Nebraska v. Iowa, supra." *See also Mercurio v. Duncan*, 131 Neb. 767, 769, 269 N.W. 901, 902 (1936); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 621, 259 N.W. 647, 648 (1935); *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 610, 148 N.W. 328, 329 (1914); *De Long v. Olsen*, 63 Neb. at 331, 88 N.W. at 514. Principles articulated by this court in *Commissioners of Land Office v. United States*, 270 F. 110 (8th Cir. 1920),

appeal dismissed, 260 U.S. 753 (1922), were quoted with approval in *State v. Ecklund*, 147 Neb. 508, 521-22, 23 N.W.2d 782, 789-90 (1946) and were applied in *Durfee v. Keiffer*, 168 Neb. 272, 280, 95 N.W.2d 618, 624 (1959), and *Frank v. Smith*, 138 Neb. at 392, 293 N.W. at 334-35. An even earlier eighth circuit case, *Whiteside v. Norton*, 205 F. 5 (8th Cir. 1913), *appeal dismissed*, 239 U.S. 144 (1915), was also followed in *Durfee v. Keiffer*. As the district court stated: "Nebraska law has relied heavily on federal law in formulating its definitions of accretion and avulsion." *United States v. Wilson*, 433 F. Supp. at 65.

The case of *Nebraska v. Iowa*, 143 U.S. 359 (1892), which has had a seminal influence on the development of the legal definitions of accretion and avulsion in Nebraska case law, established that while the nature of the Missouri River might lead one to assume otherwise, the law of boundary changes due to diminution and accretion could apply to the River, at least "in the mere washing of the waters of the stream." *Id.* at 370. While erosion might take place rapidly on the banks of the Missouri, the boundary change rule would still apply as long as the land eroded so as to be completely disintegrated, *and* the accretion, despite the unusual rapidity of the erosion, was "a mere gradual and imperceptible process." *Id.* at 369; *see also, De Long v. Olsen*, 63 Neb. at 331, 88 N.W. at 514.

As Nebraska case law makes clear, this basic statement of accretive change in the Missouri River has two elements. First, a boundary changes only where the River's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other – the

land between the old and new channels must be completely disintegrated. This point is made most dramatically in *State v. Ecklund*, a case in which title to old river bed land, bared by a river's gradual change in channel, was retained in accordance with the original boundary line, as is the case in avulsion. The river movement was not accretive, as the term is legally defined, because the river did not shift its channel by excavating or eroding intervening land, but by flowing around it. 147 Neb. at 523, 23 N.W.2d at 789. Other cases, involving title to islands rather than old river bed land, also illustrate the principle. *E.g., Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976); *Durfee v. Keiffer.*

The second element, stressed by the court in *Nebraska v. Iowa*, is that no matter how "rapid and great" is "the abrasion and washing away," or "the diminution," of soil, the accretion (or reliction) of soil "is always gradual and by the imperceptible deposit of floating particles of earth." 143 U.S. at 368-69.[4] This point, the gradual and imperceptible nature of accretive change as stressed in *Nebraska v. Iowa*, is evident in Nebraska cases.[5] *See, e.g.,*

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[4] Gradual and imperceptible does not mean change cannot be perceived, but only that the entire process, that is the accretion as well as the often rapid erosion, is not clearly perceptible as it is going on. *Gill v. Lydick*, 40 Neb. 508, 510-11, 59 N.W. 104, 105 (1894).

[5] Both elements are necessary. Gradual change without erosion of intervening land is not within the rule of accretive change, *see State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946); nor is the washing away of soil sufficient, if the land is not

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Bouvier v. Stricklett, 40 Neb. 792, 798-99, 59 N.W. 550, 553 (1894); *Gill v. Lydick*, 40 Neb. at 512, 59 N.W. at 105; *Mercurio v. Duncan*, 131 Neb. at 768-69, 269 N.W. at 903; *Jones v. Schmidt*, 170 Neb. at 356, 102 N.W.2d at 644.

Clear distinctions become obscured when applied to the actual movement of uncontrolled rivers, as we noted in our prior opinion. Nevertheless, the elements of river channel change through the process of excavation or erosion and deposition or accretion must have been established for defendants to have met their burden of proof under Nebraska law. Not only is accretive change defined more precisely in Nebraska law than in the district court's opinion, but correspondingly, the Nebraska Supreme Court's definition of avulsion is similar to that set forth in our prior opinion as the federal standard, in that it is not as narrow as the district court's reasoning

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(Continued from previous page)

gradually added, but suddenly formed. *See Wiggenhorn v. Kountz*, 23 Neb. 690, 37 N.W. 603 (1888). Statements echoing those of the Court in *Nebraska v. Iowa*, 143 U.S. 359 (1892) concerning the rapidity of change in the Missouri, *See, e.g., De Long v. Olsen*, 63 Neb. 327, 331, 88 N.W. 512, 514 (1901); *Kinkead v. Turgeon*, 74 Neb. 580, 586-89, 109 N.W. 744, 746-47 (1906), (vacating 74 Neb. 573, 104 N.W. 1061 (1905)); *see also* discussion in *United States v. Wilson*, 433 F. Supp. 57, 62-64 (N.D. Iowa 1977), refer to the rapid and sudden erosion and do not lessen the importance of the gradual and imperceptible requirement as it pertains to the second element of the movement process, accretion (or reliction) of soil. *See Nebraska v. Iowa*, 143 U.S. at 369.

would indicate.[6] In contrast to the process of erosion and gradual deposition, avulsive movements of a river channel are characterized primarily by their suddenness and perceptibility.

The Nebraska cases indicate Nebraska follows the basic common law principle: avulsion occurs when there is a sudden and rapid change of the channel, within or without the bed of a stream, whether or not intervening land is submerged during a sudden flood. A recent definition given by the Nebraska Supreme Court indicates the broad parameters of avulsive movement include movement within the river bed, and also illustrates the primary emphasis on sudden change:

> " 'Avulsion' is a sudden and perceptible loss or addition to land by the action of water, *or* a sudden change in the bed or course of a stream." 78 Am.Jur.2d, Waters, s. 406, p. 852. See, also, *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190; *Mercurio v. Duncan*, 131 Neb. 767, 269 N.W. 901.

Valder v. Wallis, 196 Neb. 222, 224, 242 N.W.2d 112, 114 (1976) (emphasis added).

Other cases stress the sudden character of avulsive change as its primary distinction from the process of erosion and gradual deposition. *See, e.g., Gill v. Lydick*, 40

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[6] It should be noted that there is no presumption in Nebraska law that change in a river channel in general or in the Missouri is due to accretion. *See Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960). In fact, even though the Supreme Court decided in *Nebraska v. Iowa*, 143 U.S. 359 (1892), that accretion could occur on the Missouri, the Nebraska Supreme Court noted that "[t]he Missouri river often changes its course by avulsion, ..." *Independent Stock Farm v. Stevens*, 128 Neb. 619, 621, 259 N.W. 647, 648 (1935).

Neb. at 512, 59 N.W. at 105 ("[B]ut, if the alteration takes place suddenly, the land thus formed does not belong to the proprietor of the adjoining soil."); *Wiggenhorn v. Kountz*, 23 Neb. at 694, 37 N.W. at 605 (quoting 3 Washburn R. P. 60 (4th ed.)) (" 'The difference between avulsion, . . . and alluvion, consists in the one being done by imperceptible loss from the land of one, and increment to that of the other; and in the other, its being done suddenly, to an extent which can be ascertained and measured.' "); *Ingraham v. Hunt*, 159 Neb. 725, 732, 68 N.W.2d 344, 348-49 (1955) ("a flood suddenly, violently, and visibly, by avulsion, changed its channel. . . .during the next few years, there were several flash floods which again suddenly, violently, and visibly by avulsion moved the channel. . . . ."); *Jones v. Schmidt*, 170 Neb. at 356, 102 N.W.2d at 644 (Some of the new structures [of land] came into being with suddenness, and others imperceptibly by addition over long periods of time to other structures. . . .the latter . . . is termed accretion.")[7]

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[7] While the district court correctly noted the Nebraska Supreme Court reversed an earlier finding of avulsion and held movement which occurred during a single high water period caused by an ice jam was accretive in *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943) (vacating 141 Neb. 517, 4 N.W.2d 290 (1942)), the decision does not, we feel, represent a departure from the basic common law definitions. It may be better explained by the fact that no party pleaded avulsion, as none had title to the land in question if the old channel remained as the boundary. They sought title through adverse possession of accretive land. *Id.* at 8, 9, 8 N.W.2d at 541. *Conkey II* does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: "Avulsion is the sudden and rapid change in the course and channel of a river." *Id.* at 10, 8 N.W.2d at 541.

Thus, in a channel shift the primary distinction in Nebraska law is between sudden and perceptible change and the process of erosion and gradual, imperceptible deposition. We adhere, therefore, to our earlier holding that the district court erred in including within the definition of accretive change a sudden movement without evidence of identifiable land in place.[8] Defendants' burden is not met by the absence of proof of identifiable land in place; of greater importance is the sufficiency of proof

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[8] Although we illustrated with specific federal cases, *Veatch v. White*, 23 F.2d 69 (9th Cir. 1927); *Uhlhorn v. United States Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967), we noted in other jurisdictions adopting common law principles, identifiable land in place is a "significant" factor, but not the *sine qua non* to finding an avulsive shift of channel. We specifically cited Nebraska cases that referred to identifiable land in place when using Vattel's reference to avulsion in illustrating the "insensible" character of accretion, quoted in *Nebraska v. Iowa*, 143 U.S. 359, 366 (1892): "[W]hen the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner." We then noted the context was not a narrow definition of avulsion, but rather the Supreme Court's attempt to show accretion, as well as avulsion, could take place on the Missouri. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 635 n.30 (8th Cir. 1978). Our analysis of federal case law and that of other jurisdictions, set forth in section V, concludes that other jurisdictions concur in the general definition of avulsion as sudden movement and the possibility of its occurrence within as well as without the bed of a stream. *Id.* at 637 n. 32, 33. We concluded: "Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion. *Id.* at 637 (footnote omitted).

of erosion and gradual accretion. Because the unusually sudden and rapid erosion on the Missouri blurs the theoretical distinction between avulsion and accretion, the presence of identifiable land in place may have significant probative value in that it disproves one element of accretive change: erosion. *Omaha Indian Tribe v. Wilson*, 575 F.2d at 637. The absence of identifiable land above high water cannot make defendants' case, however. Erosion must be shown; the mere fact that intervening land was once submerged does not yield the inference of river movement by accretion. For instance, in *State v. Ecklund*, the intervening land in a channel change was old river bed land. This fact alone did not justify application of the rule of accretion, however. The boundary remained the same, because the cause of the channel change was not gradual movement across the land by excavation and accretion, but diversion of the river's flow around a body of land. *Ecklund* relied upon an early opinion of this court concerning the situation where change, albeit gradual, is not due to erosion and subsequent accretion:

> To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion if its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the

> boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

147 Neb. at 522, 23 N.W.2d at 789-90 (quoting *Commissioners of Land Office v. United States*, 270 F. at 113).[9]

Because both inundation and baring of land are part of the swift change process referred to as avulsion, *see* Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. Rev. 429, 431 (1967), intact land may well be temporarily under high water. As was noted by the district court, 433 F. Supp. at 65, when a bank is composed of point bar deposits, or sand and sediment, it may be difficult to detect land present prior to the swift inundation and baring of avulsive movement. Similarly, deposits of alluvion which increase a bank by accretion may follow avulsive changes. *See, e.g., Independent Stock Farm v. Stevens*, 128 Neb. at 622, 259 N.W. at 649. Therefore, evidence of relative variations in water elevation at different times and some changes in topographical conditions alone is not sufficient to prove accretion. *See, e.g., Jones v. Schmidt*, 170 Neb. 351, 358, 102 N.W.2d 640, 645 (1960).

We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change. We hold the district court incorrectly interpreted the

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[9] *Commissioners of Land Office v. United States*, 270 F. 110 (1920), *appeal dismissed*, 260 U.S. 753 (1922), relied upon *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918), which was quoted in our prior opinion. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 637 n.34 (8th Cir. 1978).

Nebraska cases to hold that all river movements, other than those in which intervening land above the high water mark is identifiably in place, are included within the term accretion. Thus, our review of the evidence in sections VI-VIII of our prior opinion compels the same holding: defendants' evidence supports only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods. Inferences drawn from the 1879 map, admittedly prepared at high water, are inconclusive; prior alluvion in that area means identifying features would be few; erosion on the surface of the point of land could have occurred as it was bared following swift inundation in the avulsive process. As we observed in our earlier opinion, the evidence strongly suggests avulsive change in 1879 through a series of chute channels or a cut-off across the neck of the Blackbird Bend. As to the later time periods, the little scientific evidence there is in the record contradicts the defendants' theory.

III. *Application of Law to Facts.*

Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous. Even if it be assumed that identifiable land in place is the *sine qua non* of avulsive movement, the evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on speculation and conjecture, to support the inference of accretive change. Not only is defendants' evidence of a lack of identifiable land in place inconclusive, *Omaha Indian Tribe v. Wilson*, 575

F.2d at 640-41, but there is evidence the land could be the same surface area described by Barrett. *Id.* at 641. Evidence supporting the possibility of avulsive chute channels or a neck cut-off does not equally balance defendants' proof, but rather points to the speculative and conjectural nature of *any* conclusions drawn from the evidence. Evidence of river movement in the critical periods too often gives no more than a basis for an "educated guess," in the words of defendants' expert witness, Raymond L. Huber. Particularly in light of the requirement that defendants, because of the presumption applicable under 25 U.S.C. § 194, succeed on the strength of their own case and not any weakness in their opponents' claim to title, we conclude they failed to meet their burden of proof. As we stated previously, "the ultimate conclusion may not rest on mere guesswork." *Omaha Indian Tribe v. Wilson,* 575 F.2d at 650.

IV. *State of Iowa.*

We turn now to the reversal of this court's judgment that the State of Iowa was similarly bound by 25 U.S.C. § 194's allocation of the burden of proof. The record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion. Under the circumstances, we feel the Tribe's case against the State should be separately remanded, and an opportunity given to sever the claim against the State and point out specific evidence relied upon to show avulsion

on the particular land claimed by the State.[10] The district court shall review this evidence and make separate findings in regard to it.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures, with the exception of those funds relating to the land now claimed by the State of Iowa, governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854, are ordered dissolved. The judgment of the district court is vacated as to the State of Iowa, and the cause remanded with directions that the Tribe's case against the State be severed and the Tribe given an opportunity to clarify its allegations against the State and the evidence it relies upon, so that the district court may separately review whether the Tribe has sustained its burden of proof against the State.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[10] We fail to understand the Tribe's argument that the State's case is defective because its title is based upon quitclaim deeds, but will allow the Tribe to restate the argument in district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN R. WILSON, et al., Defendants.	C 75-4024
OMAHA INDIAN TRIBE, etc., Plaintiff, vs. HAROLD JACKSON, et al., Defendants.	C 75-4026 *O R D E R* (Filed Nov. 8, 1984)
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067

This matter is before the court on plaintiff's resisted motion for reconsideration and for stay, filed October 19, 1984 and the State of Iowa's application for possession, filed May 17, 1984. Motions denied.

On September 7, 1984, this court amended Judge Bogue's order of January 13, 1984 and certified certain questions of law for interlocutory appeal pursuant to 28 USC § 1292. On October 11, 1984, the Eighth Circuit

denied the petitions for permission to appeal in connection with this order. Thus, the matter is again before this court in the same posture that preceded the September 7 order.

In the motion now under consideration, the Tribe has once again invited the court to reconsider the issues decided by Judge Bogue in the January 13, 1984 order. The court has previously declined plaintiff's invitation and believes it should be refused again. While this judge may or may not have resolved the issues decided by Judge Bogue in the same manner, this court sees no reason to reconsider a decision made by the judge most familiar with the evidence and the prior appeals in this case.

Nor does the court believe that there is any merit, at this juncture, to the Tribe's suggestion that the court reconsider the 1976 severance order and the January 13, 1984 order so as to quiet title to lands outside the Barrett Survey in the Tribe. The practical effect of such an order would be the denial of due process to those defendants in the consolidated actions who now occupy land within the Blackbird Bend area but outside the boundaries of the Barrett Survey. These parties are yet to be heard and the Tribe's action against them is in a procedurally different posture since it is an action at law for ejectment rather than a quiet title proceeding.

In the opinion of this judge, the mandate from the Eighth Circuit is clear. It will be necessary to resolve all issues arising out of the Barrett Survey portion of the consolidated cases before an appeal may be taken. Therefore, it will now be necessary to obtain legal descriptions

for those parcels to which title will be quieted in the State of Iowa and the private defendants. Once these descriptions are prepared, the court shall proceed with the issues concerning improvements on the 2,200 acres to which title will be quieted in the Tribe and in the United States as trustee for the Tribe. It is the court's further opinion that the Tribe's claim for trespass damages on these lands, previously severed from this part of the action by the court's order of April 5, 1976, should be consolidated and taken up in connection with the improvement claims.

The court has again reviewed Judge Bogue's order of October 22, 1976 and is of the opinion that this order affirmatively establishes the Bureau of Land Management's March 2, 1976 Dependent Resurvey as the controlling retracement of the 1867 Barrett Meander Line. The court intends to abide by this order unless the Tribe, by not later than November 26, 1984, makes a showing by proper affidavits and briefs that it has either exhausted its administrative remedies in connection with the alleged errors or that exhaustion of such remedies is not required in the context of this case. Any resistance to such showing by defendants shall be filed within the time provided by the Local Rules. The court shall then determine if any further hearing is required on these matters.

With regard to the State's pending application for possession, it is the court's opinion that the application is premature and should be denied. The precise boundaries of the parcels which will be quieted in the State have yet to be determined and it is the court's opinion that the State's interests will be adequately protected by maintenance of the parties' current positions until final judgment can be entered. If the State is seriously contending

that the Tribe's repair to the access road is in violation of the court's prior orders and has caused damage to the parcels which it claims, the State may submit a counterclaim for such damage as part of this proceeding.

It is therefore

ORDERED

1. Motions denied.

2. The Tribe shall, by not later than November 26, 1984, file a brief and any supporting affidavits required to show that it has exhausted its administrative remedies in connection with the alleged errors in the Bureau of Land Management's March 2, 1976 Dependent Resurvey or that exhaustion of such remedies is not required in the context of this case. Any resistance to such showing by defendants shall be filed according to the provisions of Local Rule 2.2.6.

November 8, 1984.

/s/ Edward J. McManus
Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN R. WILSON, et al., Defendants.	C 75-4024
OMAHA INDIAN TRIBE, etc., Plaintiff, vs. HAROLD JACKSON, et al., Defendants.	C 75-4026 *O R D E R* (Filed Aug. 8, 1988)
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067
OMAHA INDIAN TRIBE, Plaintiff, vs. AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al., Defendants.	C 75-4067 *ORDER*

This matter is before the court on a resisted motion for partial summary judgment filed by Iowa Public Service Corporation (IPS) on March 17, 1977, (docket #100 in C75-4067), and on the Tribe's resisted motion to strike jury demand, filed March 10, 1976, in the consolidated cases (docket #120). Motions denied.[1]

IPS SUMMARY JUDGMENT MOTION

It appears that the land which is the subject of the instant motion is in the Omaha Mission Bend area, and is now in the possession of IPS (or its tenants). IPS asserts that the Tribe's claim is based upon an avulsive river movement having taken place in the Omaha Mission Bend area. IPS contends the Tribe has no material facts to support its claim that an avulsion occurred.

"Summary judgment is appropriate only when there is *no* genuine issue of material fact, so that the dispute may be decided upon purely legal grounds." *Agristor Leasing v. Farrow,* 826 F.2d 732, 734 (8th Cir. 1987) (emphasis in original), citing *Holloway v. Lockhart,* 813 F.2d 874, 878 (8th Cir. 1987).

The briefest review of the history of this litigation demonstrates that the Tribe's case is based upon the nature of past movements of the Missouri River, and the

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[1] Pursuant to the court's order of June 15, 1987, IPS renewed its summary judgment motion on September 16, 1987, (docket #130 in C75-4067), and it is therefore properly before the court. On April 5, 1976, the court reserved ruling on the Tribe's motion to strike jury demand as it pertains to the remaining portion of this litigation, and the court herein resolves that issue.

geophysical and legal effect of that movement. As is plain from the legal history of this matter, a sharp factual dispute is presented from river morphologists' analyses of topographical features left in the wake of river movement. The topography itself is evidence. The motion shall be denied.

MOTION TO STRIKE JURY DEMAND

As this case now stands, the remaining issues are 1) the Tribe's claim to land not now in its possession, and 2) the Tribe's claim for damages from the defendants' alleged trespass upon that land.[2]

When first made in 1976, the Tribe's motion was predicated upon its characterization of this matter as a quiet title action, historically an equitable matter to which there is no constitutional right to jury trial. However, and as noted above, it is uncontested that the Tribe is not in possession of any of the remaining land in this matter, and accordingly this case is an action to recover real property, or an ejectment action. Thus characterized, the only issues presented are legal in nature, and therefore a

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[2] On April 5, 1976, the Tribe's claim for damages was severed from the consolidated cases. On April 11, 1986, and in accordance with the suggestion of the Court of Appeals in *Omaha III*, 707 F.2d 304, 312 n.1 (8th Cir. 1983), the court rejoined the damage issue in the consolidated cases so as to resolve all matters regarding the Barrett Survey area. The Tribe's claim for damages in the Barrett Survey area was dismissed with prejudice on December 1, 1986, as a sanction for noncompliance with the court's order of November 17, 1986.

jury trial is clearly warranted. *See Pernell v. Southall Realty,* 416 U.S. 363, 374-376 (1974).

As a final matter, on July 20, 1988, the court noted that Mr. John O'Brien had not yet complied with the court's order of June 3, 1988, which directed him to pay over the Rupp-Weaver funds to the Clerk of Court. It has now come to the court's attention that through inadvertence Mr. O'Brien was not on the service list maintained by the Clerk's Office and therefore never received a copy of the court's June 3, 1988 order. The court regrets this oversight. The Clerk's records show that Mr. O'Brien paid over the funds on August 1, 1988, and he is therefore in compliance.

It is therefore

ORDERED

1. IPS motion for summary judgment denied.

2. Tribe's motion to strike jury demand denied.

August 8, 1988.

/s/ Edward J. McManus
Edward J. McManus, Judge
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1426, 88-1592 and 88-1636

In the Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON ET AL.

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's interests in this litigation.

2. Whether the instant litigation should have adjudicated those parts of the Tribe's claims that have been severed for future consideration.

3. Whether the district court violated Fed. R. Civ. P. 52(a) when it concluded that it was unnecessary, on the third remand of this complex litigation, to reiterate the factual findings set forth in earlier opinions.

4. Whether the burden-of-proof provisions of 25 U.S.C. 194 were correctly applied to the facts of this case.

5. Whether the escrowed net profits from the farming operations on the lands at issue were available to defray the payments to the defendants for the improvements they had made to those lands, as to which title has been quieted in the United States for the beneficial interest of the Tribe.

6. Whether the burden-of-proof provisions of 25 U.S.C. 194 subject the petitioners in No. 88-1592 to invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

7. Whether a decision to apply 25 U.S.C. 194 to the claims of the State of Iowa would deprive that State of its constitutional rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1426

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON, ET AL.

No. 88-1592

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

No. 88-1636

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The latest opinion of the court of appeals (Pet. App. 37a-48a)[1] is reported at 854 F.2d 1089. The latest opinion of the district court (Pet. App. 5a-15a) is reported at 578

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[1] "Pet. App." refers to the Appendix to the petition in No. 88-1426.

F. Supp. 1191. The final judgment of the district court (Pet. App. 16a-30a) is unreported; the modification thereof (Pet. App. 31a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988, and a petition for rehearing was denied on November 10, 1988 (Pet. App. 49a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 28, 1989. The petition, No. 88-1426, was filed on that date and received by both cross-petitioners on March 3, 1989 (88-1592 Pet. 2; 88-1636 Pet. 3). Pursuant to Sup. Ct. R. 19.5, the cross-petition in No. 88-1592 was filed on March 30, 1989, and the cross-petition in No. 88-1636 was filed on Monday, April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation is a dispute over title to land within the original boundaries of the Omaha Indian Reservation created by treaty in 1854 along the west bank of the Missouri River in what was then Nebraska Territory. The River has changed course numerous times since 1854. In 1867, when the portion of the Reservation boundary at issue was surveyed by T. H. Barrett (the Barrett Survey), the River made a sharp oxbow curve creating a peninsula attached to the west or Nebraska side of the River.[2] The approximately 2,900-acre peninsula, which has since been cut off from the Nebraska side by the River and now lies

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[2] The district court described the oxbow early in this litigation as "a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa" (Pet. App. 207a). Maps of the area at various times appear at Pet. App. 58a-65a.

on the eastern or Iowa side, is referred to in this litigation as the Barrett Survey Area.

In 1975, the United States brought suit as trustee for the Omaha Tribe to quiet the government's title to the lands within the Barrett Survey Area, with the exception of about 400 acres that had been allotted to individual Indians and subsequently sold to non-Indians (the fee-patented lands). Pet. App. 95a, 100a, 263a.[3] The Tribe subsequently filed two suits in its own right, claiming title not only to the fee-patented lands, but also to a larger 6,390-acre area known as Blackbird Bend, which encompasses the Barrett Survey Area, and to about 5,000 acres within two additional bends upstream (Pet. App. 253a, 269a). The three suits were consolidated and the Tribe's claims to lands outside the Barrett Survey Area and for damages were severed. The district court entered judgment against the Tribe and the United States in 1977 with respect to the common claims for the Barrett Survey Area (Pet. App. 252a). The court of appeals reversed (Pet. App. 135a), and this litigation came before this Court for the first time in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979); the Court there vacated the court of appeals' judgment and remanded the case for further proceedings. Over the last decade, the subsequent proceedings in both courts below have again culminated in a final judgment, which the Tribe[4] now asks this Court to review.

The fundamental factual issue in this litigation is whether the Missouri River moved by avulsion or by ero-

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[3] In preparing answers to interrogatories, the United States discovered an additional 300 acres that had been allotted and sold.

[4] For the sake of simplicity, petitioners in No. 88-1426 will be referred to as the Tribe, conditional cross-petitioners in No. 88-1592 will be referred to as individual defendants, and conditional cross-petitioners in No. 88-1636 will be referred to as the State.

sion and accretion subsequent to the Barrett Survey.[5] The Tribe's claims of title rest on the contention that the River moved by avulsion prior to 1923, and thereafter by erosion and accretion along the western edge of the survey area. The fundamental legal issue involves the interpretation and the scope of 25 U.S.C. 194.[6] This Court in *Wilson* concluded that Section 194 applies to disputes with Indian tribes, and that it shifts the burden of persuasion, as well as the burden of coming forward with evidence, to the non-Indian party once the Indian party establishes a prima facie case, but that Section 194 does not apply to a State. 442 U.S. at 664-669.[7]

Applying the interpretation of Section 194 adopted by this Court in *Wilson*, the court of appeals on remand ordered title to approximately 1,900 of the 2,900 acres in the Barrett Survey Area quieted in the United States on

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[5] As the Court explained in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660 n.7 (citations omitted):

> Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel.

[6] That Section provides that:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

[7] The Court also concluded that, although federal law governs the definition of what types of river movement constitute avulsion rather than erosion, state law should be adopted as the federal rule of decision. 442 U.S. at 671-676.

behalf of the Tribe; it remanded to the district court for further proceedings with respect to the fee-patented lands and certain lands in the western part of the Barrett Survey Area claimed by the State of Iowa. *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980). On remand, the district court found that the Tribe had proved by a clear preponderance of the evidence that neither the State nor the individual defendants had a valid claim to the disputed land, and quieted the title to the entire Barrett Survey Area in the United States as trustee for the Tribe. *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981) (Pet. App. 76a-84a).[8] The district court also denied the individual defendants' counterclaim for the value of their improvements to the lands, holding that the sovereign immunity of the United States barred the counterclaim (Pet. App. 84a-89a).

On appeal, the court of appeals reversed, holding that the district court had improperly given the Tribe the benefit of 25 U.S.C. 194 in adjudicating the claims to the lands held by the State and to the fee-patented lands. *United States* v. *Wilson*, 707 F.2d 304 (8th Cir. 1982), certs. denied, 465 U.S. 1025 and 1101 (1984) (Pet. App. 94a-103a). The court of appeals also ruled that the United States could be held liable for the value of improvements, holding that the equitable duty to pay for the improvements "is an element of the government's own claim, a condition precedent to the right of the United States to recover" and that the doctrine of sovereign immunity was therefore "inapplicable" (Pet. App. 106a). This Court

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[8] The district court concluded that the court of appeals' opinion established the Tribe's ownership of all the Barrett Survey Area land (including the fee-patented lands) except that claimed by the State along the western edge of the area, and since the river had moved by accretion, not avulsion, the Tribe owned that land as well. Pet. App. 74a-77a & n.15.

denied the United States' petition for certiorari on that issue, 465 U.S. 1025 (1984).

Once again on remand, the district court issued its most recent opinion, holding that, without benefit of the Section 194 presumption, the Tribe had failed to prove that the river movements between 1879 and 1923 were avulsive and thus had failed to prove its claims to either the fee-patented lands or to the land held by the State, and that the individual and state defendants had met their burden of proving that title to these lands should be quieted in them. *United States* v. *Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984) (Pet. App. 8a-15a). The final judgment, dated May 29, 1987 (Pet. App. 16a-30a), quieted title to the 1,900 acres of the eastern Barrett Survey Area in the United States in trust for the Tribe and quieted title in the remaining 1,000 acres of fee-patented land and land held by Iowa in the individual defendants and the State, respectively. The judgment also obligated the United States to pay the individual defendants for the stipulated value of the improvements, totalling more than $1.9 million plus prejudgment interest (Pet. App 22a), and permitted the United States to use the escrow fund held in the registry of the district court "to partially satisfy its obligation to pay for improvements" (Pet. App. 30a).[9] On the Tribe's motion, the district court subsequently amended its order and denied the United States the right of reimbursement from the escrow fund (Pet. App. 33a-36a).

[9] The escrow fund had been created pursuant to the district court's order of June 5, 1975, the preliminary injunction which put the Tribe in possession of the lands. In order to reduce the "probability of financial injury to the defendants," the court required the Tribe to deposit the net profits from the 1975 farming operations on these lands with the clerk of court pending final disposition of this quiet title action (Pet. App. 259a, 262a). The profits from subsequent years were also deposited (Pet. App. 34a-35a).

In the latest round of appeals, the Eighth Circuit affirmed the judgment quieting title to the remaining 1,000 acres in the Barrett Survey Area in Iowa and the individual defendants, rejecting the Tribe's claims that the district court erred first, in finding that the Tribe had not met its burden of proof and second, in failing to set forth its factual findings in sufficient detail (Pet. App. 40a-44a). The court of appeals upheld the government's claim on its appeal that the district court should have allowed the profits from the escrow fund to be used to pay for the improvements (Pet. App. 44a-45a), but it rejected the government's challenge to the award of prejudgment interest on the value of the improvements, holding that the award of interest was no more a breach of the government's sovereign immunity than the equitable requirement that the United States pay for the improvements (Pet. App. 45a-47a). Finally, the court of appeals rejected the argument of the individual defendants that, because 25 U.S.C. 194 placed the burden of proof upon them as white citizens, it amounted to invidious racial discrimination and violated Fifth Amendment due process (Pet. App. 47a).

ARGUMENT

1. None of the questions presented in the petition for certiorari in No. 88-1426 merits review by this Court. On these questions, the decision of the court of appeals is correct and does not conflict with any decision of this Court (including the earlier decision in *Wilson* v. *Omaha Indian Tribe, supra*), or of any other court of appeals.

a. Petitioner Tribe alleges that two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's real interests in this litigation, and, as a result, the government's claims on behalf of the Tribe

were "intentionally constricted" (88-1426 Pet. 4-5, 18-22). The United States has responded to these charges in both the district court and the court of appeals, demonstrating that the government's filing of the complaint that initated this action was properly authorized in accordance with established procedures. See, *e.g.*, Pet. App. 329a-336a, 450a-460a. The district court found that the Tribe's contentions of impropriety were entirely without factual or legal basis. Indeed, after concluding that the Tribe's motion for summary judgment based on those contentions was "so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted", the court awarded sanctions against petitioner Tribe's counsel under Fed. R. Civ. P. 11 for frivolous pleadings (Pet. App. 365a-366a).[10] The court of appeals subsequently denied the Tribe's petition for relief based on these allegations as "frivolous and totally without merit"; that court also awarded sanctions against the Tribe's counsel for filing "a totally frivolous pleading" (*id.* at 461a). In the latest appeal, the Eighth Circuit refused to "entertain this meritless issue" again (*id.* at 40a n.4).

It is entirely clear that this issue does not warrant this Court's attention. The Tribe—represented by counsel of its choice—has participated fully in litigating title to the lands within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[11]

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[10] The same counsel continues to represent the Tribe in this Court.

[11] In the previously severed portion of the suit (see p. 3, *supra*), the district court found on March 24, 1989, that the Tribe and its counsel have not complied with several earlier orders in the instant portion of the suit—including orders requiring the payment to the individual defendants, the State, and the United States of specified costs as sanc-

b. Petitioner Tribe also appears to argue that the judgment below should have encompassed all the lands claimed by the Tribe, including those located outside the Barrett Survey Area (88-1426 Pet. 23-26). However, as the court of appeals correctly noted (Pet. App. 44a n.5), the scope of the present litigation was long ago limited to settling title to the lands within the Barrett Survey Area, leaving the Tribe's larger claims for later adjudication. See *Wilson* v. *Omaha Indian Tribe,* 442 U.S. at 660. The Tribe's remaining claims are yet to be litigated. The effect, if any, of the present judgment upon those claims remains for consideration in the context of that litigation (cf. Pet. App. 48a), and is accordingly not ripe for determination by this Court.

c. Petitioner Tribe also contends that the court of appeals failed to enforce the requirement of Fed. R. Civ. P. 52(a) that a district court must adequately set forth its findings (88-1426 Pet. 25-26). The district court's final opinion declared that "[n]othing is gained by recataloguing the evidence here" (Pet. App. 8a). The court of appeals stated that the adequacy of the findings "must be viewed against the extensive prior scrutiny of the evidence in this case not only by the district court on two occasions, but also by this court on three separate occasions and by the United States Supreme Court" (*id.* at 43a). The court of

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tions for frivolous filings, and orders imposing fines for contemptuous conduct. On the basis of these findings, the district court entered an order dismissing the Tribe's remaining claims with prejudice "unless the Tribe and Mr. Veeder fully comply with all orders as set forth herein, or show cause why they should not be required to do so by not later than April 10, 1989." Dist. Ct. Order 11. Petitioner Tribe's counsel submitted a check to the district court in payment of the amounts assessed, and asked the court to escrow the funds in its registry pending this Court's action on the instant petition for certiorari. On April 24, 1989, the district court denied the escrow request and directed the clerk to distribute the funds to the parties entitled to them under its previous orders.

appeals found (*id.* at 43a-44a) that the district court's reference to the prior decisions in this case "for a full statement of the extensive evidence" was sufficient to satisfy Rule 52(a). Nothing in this entirely routine conclusion warrants this Court's attention.

d. Petitioner Tribe challenges the application of 25 U.S.C. 194 to the factual context established in this litigation (88-1426 Pet. 25-26). The judgment below quiets the Tribe's beneficial title to all the trust lands which were in the possession of the individual, non-Indian defendants, while quieting title in those defendants only to those fee-patented lands to which the court found they held record title. The State, to which 25 U.S.C. 194 does not apply, prevailed in quieting its title to the lands for which the court found it held record title. See Pet. App. 12a-14a. There is no inconsistency on this record with this Court's decision in *Wilson* v. *Omaha Indian Tribe, supra.* In any event, this highly fact-specific claim does not warrant further review by this Court.

e. Finally, petitioner Tribe urges (88-1426 Pet. 26-28) that the court of appeals erred in permitting the funds escrowed in the district court registry to be used to defray part of the cost of improvements which the United States is obliged to pay under the judgment. The Tribe does not question that the individual defendants who occupied trust land are entitled to recover the value of the improvements from the United States. With that premise accepted,[12] the

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[12] Earlier in this litigation, the United States petitioned this Court for review of the court of appeals' holding (Pet. App. 106a) that the government could be held liable to pay for the value of the improvements, urging that sovereign immunity barred any such claim in a quiet title action in which the government sought only title, not damages or mesne profits. The petition was denied, 465 U.S. 1025 (1984). In the latest appeal, the Eighth Circuit used the same reasoning to hold the government liable to pay prejudgment interest on the value

holding of the court of appeals is clearly correct and consistent with the general trust law that a trustee is ordinarily entitled to reimbursement from the trust estate for expenses incurred for the benefit of the trust beneficiary (see Pet. App. 44a-45a). In this case, as the court of appeals found (*id.* at 45a), the Tribe "has obtained the substantial benefit of having the land within the Barrett Survey cleared, drained, and otherwise improved through the efforts of the non-Indian defendants." Title to the improved lands has been quieted to the Tribe's beneficial interest. Accordingly, the judgment properly allows the escrow fund to be used to reimburse the United States for its payment of the value of those improvements.[13]

2. Conditional cross-petitioners in No. 88-1592 and No. 88-1636 challenge the constitutionality of 25 U.S.C. 194. Because these petitions would be jurisdictionally out of time except for the provision of Rule 19.5 of the Rules of this Court, the issues presented therein are properly before this Court only if it grants the petition in No. 88-1426, on which they depend. See Sup. Ct. R. 20.5. The constitutional issues presented by cross-petitioners are, in any event, without merit.

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of the improvements, compounding its initial error in breaching the United States' sovereign immunity. See *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

Since the Court has once denied review of the improvements issue in this case and the Tribe's petition does not question the individual defendants' right to be paid for their improvements, the government has concluded not to seek review of the improvements or prejudgment interest issues in this case—though these issues may well warrant this Court's attention if they should arise in another quiet title action by the United States.

[13] Indeed, the improvements made the land suitable for farming, and the escrow fund consists of the net proceeds from farming.

a. Conditional cross-petitioners in No. 88-1592, individual defendants who occupied Barrett Survey Area lands,[14] contend that 25 U.S.C. 194 unconstitutionally placed the burden in this litigation upon them as "white person[s]" to prove their title to the trust lands. They argue that this statute constitutes invidious racial discrimination favoring Indians and Indian tribes and deprives them of due process in violation of the Fifth Amendment. As cross-petitioners frankly acknowledge (88-1592 Pet. 4), this identical issue is one the Court declined to accept when it granted certiorari in *Wilson* v. *Omaha Indian Tribe, supra.* Instead, without finding it necessary to give separate consideration to that issue and without expressing any doubts as to Section 194's constitutionality, the Court held that it applies to these cross-petitioners (442 U.S. at 653). *Wilson* thus demonstrates that cross-petitioners' constitutional objections to Section 194 are insubstantial and do not warrant this Court's plenary consideration.

As the Court found in *Wilson*, Section 194 was enacted to address the serious problem of "recurring trespass upon and illegal occupancy of Indian territory," and "to protect the rights of Indians to their properties." 442 U.S. at 664. The Court's opinion leaves no room for doubt that "the purpose of th[is] provision—that of preventing and providing remedies against non-Indian squatters on Indian lands," *id.* at 667—is a legitimate end, or that Section 194 represents a rational and appropriate means of securing that end.[15] Indeed, the result in this case confirms that

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[14] The individual defendants occupied both Indian trust lands and fee-patented lands in the Barrett Survey Area.

[15] The State's argument notwithstanding (88-1636 Pet. 12-13), there is a plain and rational connection between the undisputed former status of this area as part of the Omaha Reservation and the statutory presumption that it remains so today. Section 194 "is triggered" only

Section 194 in fact serves to fulfill the federal government's special obligation to Indians and does not produce "invidious" consequences.

The individual cross-petitioners acknowledge (88-1426 Wilson et al. Br. in Opp. 4) that the Barrett Survey Area (within which the trust lands they claim are located) "was indisputably part of the Tribe's reservation in the 1860s." Their claim is that "the movements of the Missouri River * * * *destroyed the status of the land as reservation land*" (*ibid.* (emphasis added)). Cross-petitioners lost below simply because they could not prove by a preponderance of the evidence that this was so. Section 194 merely imposed upon them the burden to prove their contention that the reservation status of these lands had been "destroyed"—the same burden they would have had to shoulder if they had sued as plaintiffs for this land.[16] This

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after "the Tribe makes out a prima facie case of prior possession or title," *Wilson*, 442 U.S. at 668, and operates only to establish a rebuttable "presumption of [Indian] title," 25 U.S.C. 194. Thus, Indians remain as subject to "loss or gain from river movements as are other riparian owners" (88-1636 Pet. 13), even though Section 194 requires non-Indians who claim lands formerly in Indian ownership or possession to carry the burden of proof—and risk of non-persuasion—on the issue whether river movements have divested the Indians of ownership.

[16] Individual cross-petitioners assume that their status as defendants in this civil action entitles them as a matter of constitutional right to have the burden of proof placed upon the plaintiffs. It is highly doubtful that cross-petitioners have a constitutional right to any particular allocation of that burden. See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.").

Cross-petitioners do not contend that anything in 25 U.S.C. 194, or in the conduct of the lengthy proceedings below, deprived them of the opportunity to present fully any evidence to support their contention

result cannot be deemed unfair, much less an example of invidious discrimination.

Moreover, individual cross-petitioners' due process claim must be viewed in light of "the unique legal status of Indian tribes under federal law and [of] the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). So viewed, Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" is to be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 554-555.[17]

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that the conceded former status of this area as part of the Omaha Indian Reservation had been destroyed by the movements of the Missouri River. Cf. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). Because there was no such deprivation, there is no merit to the State's argument (88-1636 Pet. 14-15) that Section 194 works a taking of property without the just compensation required by the Fifth Amendment. Section 194 does not interfere with the full adjudication of ownership disputes; it merely requires the non-Indian to shoulder the burden of proving his ownership by a preponderance of the evidence. Thus, contrary to the State's submission (88-1636 Pet. 14-15), Section 194 does not "transfer property" to the United States in violation of the Takings Clause. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (rejecting claim that the Quiet Title Act's statute of limitations works a compensable "taking"). Unlike the time bar in *Block*, Section 194 permits, rather than prevents, judicial determinations of title based upon all probative evidence of title. To quiet title once all the evidence is considered is not, of course, to "transfer" title but to resolve the parties' ownership dispute.

[17] The Court reaffirmed this analysis in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such,

In order to safeguard a vital tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Thus, Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligations to the Indians by protecting their most valuable property—their lands.[18] In an analogous context, this Court has approved a congressional reallocation of the burden of proof in a fashion designed to serve important federal policies. *Georgia* v. *United States,* 411 U.S. 526, 538 n.9 (1973) (Voting Rights Act places burden upon covered states to prove that proposed electoral changes are not discriminatory in purpose or effect); *City of Rome* v. *United States,* 446 U.S. 156, 183 n.18 (1980) (same).

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is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

The State cross-petitioners thus are incorrect in asserting (88-1636 Pet. 12) that because Section 194 singles out Indians for special treatment, it is "inherently suspect and subject to strict judicial scrutiny".

[18] Section 194 would therefore clearly pass muster not only under the test of *Morton* v. *Mancari, supra,* but also under the two-fold test of *Fullilove* v. *Klutznick,* 448 U.S. 448, 473 (1980), which individual cross-petitioners urge is applicable here (88-1592 Pet. 12-13). This test asks simply whether the objectives of the federal legislation are within Congress's power and whether the statute's limited use of a racial criterion is a permissible means to carry out that objective. See *City of Richmond* v. *Croson,* 109 S. Ct. 706, 717-718 (1989), discussing *Fullilove.* Here, Indians and Indian tribes are citizens for whom the United States holds lands in trust—a unique relationship—and Section 194 serves to carry out the government's trust obligations by pro-

b. The conditional cross-petition filed by the State of Iowa argues (88-1636 Pet. 9, 16) that, if the Tribe's petition is granted, this Court should also consider whether 25 U.S.C. 194 may constitutionally be applied to limit the rights of the State.

This Court has already held in this case that Section 194 does not apply with respect to the lands to which the State claims title (*Wilson* v. *Omaha Indian Tribe,* 442 U.S. at 666-668, 678); the State seeks review of the constitutionality of the application of Section 194 to its claims only in the event that a grant of the Tribe's petition puts the State at risk that the Court will "effectively overrule" *Wilson* on this point (88-1636 Pet. 9). As we have demonstrated, the Tribe's petition presents nothing to suggest that it is appropriate for this Court to reconsider *Wilson*, so there is no occasion to consider the State's objections to an application of Section 194 this Court rejected at an earlier stage of this very case.

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tecting Indian lands from the claims of non-Indians whose title cannot be established by a preponderance of the evidence. This Court's decision in *Wilson* leaves no room for doubt that Section 194 is a measure that Congress could constitutionally employ to that end, although it may be, as Justice Blackmun observed in his concurrence in *Wilson* (442 U.S. at 680-681), that Section 194 should be construed to apply in all disputes between Indians and any non-Indian—not simply any "white person"—in order to avoid creating an "irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee."

CONCLUSION

The petition for a writ of certiorari in No. 88-1426 and the conditional cross-petitions in Nos. 88-1592 and 88-1636 should be denied.

Respectfully submitted.

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No. 88-1426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE,

Petitioner,

v.

HAROLD JACKSON, *et al.*,

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

v.

AGRICULTURAL ... WILSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Final Judgment of the district court in favor of Respondent State of Iowa should not be vacated and set aside, Respondent Iowa now having admitted Mr. Hultman's representation as Attorney General in litigation involving the "same area" of land prior to Mr. Hultman's forced representation, of Petitioner Tribe as United States Attorney in *United States v. Wilson*, in which Petitioner Tribe's interests were "sold out" for the benefit of Respondent Iowa?

Whether the Court of Appeals committed reversible error in violating Rule 15(b) by refusing to declare that the *sua sponte* pretrial order of April 5, 1976, should be amended to comport with the evidence in the record, all of which evidence pertained to the full 6390 acres of land in the Blackbird Bend Meander Lobe rather than constricting its decision to the fraudulent complaint in *United States v. Wilson*?

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Rule 15(b), Federal Rules of Civil Procedure 6-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1426

OMAHA INDIAN TRIBE,

Petitioner,

v.

HAROLD JACKSON, *et al,*

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

v.

AGRICULTURAL ... WILSON, *et al.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Petitioner Omaha Indian Tribe seeks review of the Opinion of the United States Court of Appeals for the Eighth

Circuit,[1] and the Memorandum Opinion, dated January 13, 1984, of the United States District Court for the Northern District of Iowa[2] and the Final Judgment and Decree, dated May 9, 1987, as Amended June 30, 1987, unreported.[3]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing *en banc* was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

REPLY TO BRIEF IN OPPOSITION

The Solicitor General of the United States filed a Brief in Opposition to Petitioner Omaha Indian Tribe's request to be heard respecting issues vital to its very survival. Rather than fulfilling the responsibilities owing to the Court and to Petitioner Tribe, as an agent of the United States Trustee, the Solicitor General makes serious misstatements throughout that Brief in Opposition to which reply is made. That course of conduct constitutes a grave disservice to the Court by failing correctly to review the critical issues which were, in fact, tried on the merits in the district court. For example, the Solicitor General should have stated that the issues joined and fully tried pertained to the question of whether the Blackbird Bend Meander Lobe comprised of 6390 acres was accretions to the Iowa riparian bank, as contended by the private Respondents and

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[1] *Omaha Indian Tribe v. Jackson, et al.*; *Omaha Indian Tribe v. Wilson, et al.*, 854 F.2d 1089 (CA 8, 1988), Pet.App. Appendix C, p. 37a-48a.

[2] *United States v. Wilson*; *Omaha v. Jackson, et al.*; *Omaha v. Agricultural, et al.*, hereafter referred to as *Omaha v. Wilson*, 578 F.Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984); Pet.App., Appendix A, p. 5a-36a.

[3] Pet.App., Appendix B, p. 16a. [*See* Pet., p. 2-3 for full review of reported decisions].

concerning which they had the burden of proof. Those documented and undeniable facts are summarized in the paragraphs which follow.

Reflective of those grave misstatements is the initial sentence in the Brief in Opposition which states:

> This litigation is a dispute over title to land within the original boundary of the Omaha Indian Reservation . . . [involving] the approximately 2900-acre peninsula . . . referred to in this litigation as the Barrett Survey Area.[4]

The "dispute" in the trial on the merits did *not* pertain to title to lands within the Barrett Meander Line but rather involved title to the full 6390 acres of the Blackbird Bend Meander Lobe, which totally encompassed the lands within the Barrett Meander Line. That Barrett Line was not a boundary but rather a transitory high water line of the Missouri River meandered—not surveyed—by Barrett in 1867 during the flood period of that year. The boundary of the Tribe's Reservation is well stated by the Court in these terms: "The eastern boundary of the Reservation was fixed as the center of the main channel of the Missouri River, the thalweg."[5] To be noted here is the fact that the Barrett Meander Line was far removed from the boundary of Tribe's Reservation. In OMAHA, I,[6] Plate I, there is displayed the substantial land area between the meander line and the "thalweg" of the Missouri River—the boundary of the Reservation—title to which, of necessity, is claimed by Petitioner Tribe as being part of Tribe's Reservation.

Additionally and of great importance due to the misstatements in the Brief in Opposition, the Court refers to the claim of the Respondents here in these terms:

> "Petitioners argued that the river had gradually eroded the reservation land on the west bank of

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[4] Opposition, p. 2-3.

[5] Pet.App., Appendix H, 107a, 114a.

[6] Pet.App., Appendix I, p. 135 a, 143a, Plate I.

> the river, and that the disputed land on the east bank, in Iowa, had formed by gradual accretion and belonged to the east-bank riparian owners."[7]

As a consequence, rather than the "dispute" being over the title to the land within the Barrett Meander Line, the issues pertained to the title of the lands extending far from the Barrett Meander Line to the Iowa riparian bank, encompassing 6390 acres. There is set forth below Plate II, which appears in Tribe's Petition, demarking "the east-bank riparian" land as distinguished from the land within the constricted Barrett Meander Line. As a consequence it was and is a gross injustice for the Court of Appeals

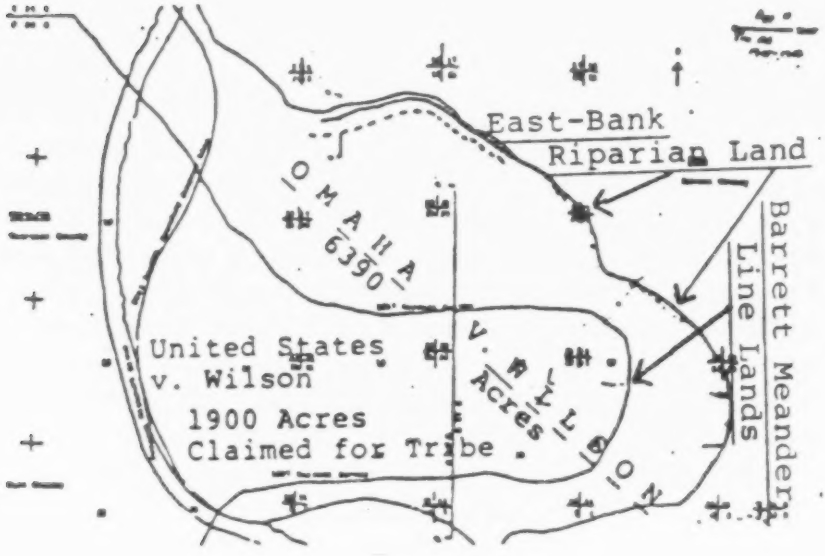

PLATE II

East-Bank Riparian Land Distinguished from Barrett Meander Line Lands

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[7] *Ibid.*, p. 115a.

in OMAHA IV, which is here for review, quoting from OMAHA III, to mandate that the Tribe has the unconscionable obligation of proving that the:

> . . . river moved westward over the eastern Barrett Survey land between 1867 and 1923 by avulsion.[8]

By that statement, the Court of Appeals in the OMAHA IV opinion—which Petitioner Tribe has asked to be reviewed—committed, it is believed, reversible error when it: (1) rejected the proof in the record in the trial on the merits comprised of evidence, received without objection, offered by Petitioner Tribe, Respondents, and indeed the Department of Justice respecting the full 6390 acres comprising the Blackbird Bend Meander Lobe—not the Barrett Meander Line land:[9] (2) imposed upon Petitioner Tribe—which had initiated its own case of *Omaha v. Wilson* and represented by counsel of its choice—the rejected and it is charged fraudulently constricted complaint in *United States v. Wilson* and the rejected representation of the Department of Justice attorneys;[10] (3) forced upon Petitioner Tribe the burden of proving an avulsion across and over the lands within the constricted Barrett Meander Line in disregard of the fact, as reviewed above, that the Missouri River was far removed from that illusory meander line which no longer existed;[11] and (4) forced Petitioner Tribe to retry the title to the lands *outside* of the Barrett Meander Line, irrespective of the fact, as will now be reviewed, that the decision of the district court in *Blackbird Bend I*, OMAHA I, and the Court's decision in *Wilson v. Omaha* were all predicated upon the trial on the merits pertaining to the lands both *within* and, of necessity, *outside* the Barrett Line up to the Iowa riparian bank, all as displayed on the Plate set forth above.

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[8] Pet.App., Appendix C, p. 37a, 40a, quoting from OMAHA III, Pet.App., Appendix G, p. 92a, 102a.

[9] Pet., p. 9, *et seq.*

[10] *Ibid.*, p. 6-9.

[11] *Ibid.*, p. 12-14.

RULE 15(b) MANDATES THE AMENDMENT OF THE PRETRIAL APRIL 15, 1976 *SUA SPONTE* ORDER PRECLUDING RETRIAL; THE PRINCIPLES OF *RES JUDICATA* ARE APPLICABLE

Further establishing the all-pervasive error in the Opposition, quoted *supra.*, p. 3, are these fully documented facts respecting the scope of the trial on the merits. Petitioner Omaha Indian Tribe in its quiet title action, *Omaha v. Wilson*, C 75-4067, claimed title to 6390 acres comprising the Blackbird Bend Meander Lobe;[12] Respondents Lakin, *et al.*, and Respondent Iowa denied Petitioner Tribe's title, claiming that: (a) the Blackbird Bend Meander Lobe was totally washed away; (b) totally replaced by accretions to the Iowa riparian bank; and (c) Respondents by mesne conveyances from the owners of the Iowa riparian bank held title to their respective claims in the 6390 acres.[13] In their Brief in Opposition, Respondent Wilson, *et al.*, reiterated their claims that their lands within the Blackbird Bend Meander Lobe were accretions to the Iowa riparian bank.[14] Respondent Iowa in its Opposition likewise asserted that the State and private defendants ". . . presented evidence that the river moved by accretion."[15] Predicated upon the evidence offered without objection among Petitioner Tribe and Respondents, the district court found as a fact, albeit clearly in error, that (1) Respondents proved that the Blackbird Bend was completely obliterated and (2) replaced by accretions to the Iowa riparian land and dismissed Petitioner Tribe's claim to the 6390 acres.[16]

The Court of Appeals in OMAHA I declared that the finding of the district court essential to Respondents' case—

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[12] Pet., p. 9, *et seq.*, Pet.App., Appendix O, p. 269a, 272a.

[13] Pet., p. 9, *et seq*; Pet. App., Appendix CC, p. 378, 379a-380a, para. 8. [Respondents Lakin, *et al.*, answers 376a identical as to counterclaims with R.G.P., Inc.,]

[14] Respondent Wilson's Brief in Opposition, p. 5, 2nd paragraph.

[15] Iowa's Opposition, p. 5.

[16] Pet.App., Appendix K., p. 205a, 241a-245a.

that the land comprising the Blackbird Bend Meander Lobe (including the land within the Barrett Meander Line) was accretions to the Iowa riparian bank—is "clearly erroneous and not supported by substantial evidence."[17]

The Court, in *Wilson v. Omaha*, further underscores the error in the Opposition by declaring that Respondents' claimed title was predicated upon the assertion that their lands were accretions to the Iowa riparian bank,[18] necessarily involving lands *outside* the Barrett Meander Line and extending to the Iowa riparian bank.

Seeking to avoid the undeniable fact that the title to the 6390 acres was the subject *res* in the trial on the merits, the Solicitor General's Brief in Opposition continues erroneously to state that Petitioner Tribe:

> . . . has participated fully in litigating title to the land within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[19]

The Solicitor General seeks to force Petitioner Tribe to retry issues already tried. It is urged to the Court that where, as here, the issues which were tried and which are necessary to the decision of the court, as here, the evidence in the record is controlling over both the pleadings and the *sua sponte* pretrial April 5, 1976 Order which purported to limit the litigation to the land area claimed by the Department of Justice in its constricted case of *United States v. Wilson*—the Barrett Meander Line.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, and the precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was never-

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[17] Pet.App., Appendix I, p. 135a, 167a.

[18] Pet.App., Appendix H, p. 107a, 115a; *see*, Plate II above.

[19] Opposition, p. 8.

theless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[20]

Reference is again made to Petitioner Tribe's analysis of the facts and law respecting the principles of *res judicata* which preclude Petitioner Tribe from being forced to retry the issue respecting title to the lands *outside* the Barrett Meander Line.[21] It is stressed that when an issue "of fact or law is actually litigated" which is essential to the judgment, those issues may not again be tried.[22] There is no question that the Court in *Wilson v. Omaha* could not have rendered its decision relative to the land within the Barrett Meander Line had the issue not been fully tried in regard to the lands outside the Barrett Meander Line extending to the Iowa riparian bank.[23]

RESPONDENTS IOWA'S ADMISSION OF HULTMAN'S PRIOR REPRESENTATION AFFIRMS PETITIONER TRIBE'S FRAUD CHARGES[24]

The admission by Respondent Iowa that Mr. Hultman had previously represented Respondent Iowa involving the

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[20] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968); *Shelley v. Union Oil Co.*, 203 F.2d 808 (CA 9, 1956); *see* also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955).

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b); Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sect. 15-13[1]. p. 15-119, *et seq*; In addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al., v. Holt*, 469 U.S. 464, 471 (1985), there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders. Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

[21] Pet., p. 23.

[22] *Ibid.*

[23] *Supra.*, Plate, p. 4.

[24] Respondent Iowa's Brief in Opposition, p. 13.

"same area" of land prior to forcing his representation upon Petitioner Tribe[25] and the district court's declaration that it had not and would not hear the fraud charges establish that Petitioner Tribe's fraud charges are not "frivolous and without merit."[26] Most assuredly Petitioner Tribe's motion for summary judgment establishing the forced, fraudulent representation by Mr. Hultman and other attorneys in the Department of Justice—supported by uncontroverted affidavits—was not "flawed."[27]

The Court is urged fully to consider the harsh refusal of the Court of Appeals to permit Petitioner Tribe to be heard on the fraud charges and its statement that it ". . . unequivocally determined prior to oral argument that it would not entertain this meritless issue"[28] constitute sound grounds for reversal due to the all-pervasive nature of the fraud which has now been substantially admitted.

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[25] Pet., p. 6-9; p. 18, *et seq.*

[26] Brief in Opposition, p. 8.

[27] Petitioner Tribe's motion for summary judgment is the proper vehicle to establish the fraud by the attorneys in the Department of Justice. *Moore*, predicated upon numerous decisions, makes this statement:

> Relief from fraud is as varied as the cunning and artifice that are productive of the fraud. An affirmative claim [for summary judgment] may be predicated upon fraud, as a claim for damages, for an accounting and damages . . . the impression of a trust, and other appropriate relief . . . .

Moore further stresses that:

> . . . in whatever manner the issue of fraud may appear in an action, the general basic principles underlying summary judgment apply and, if these are met, the issue of fraud may be summarily adjudicated . . . .

Vol. 6, *Moore's Federal Practice*, Summary Judgment, [27]—Fraud, p. 56-498, *et seq. See*, also p. 56-691, *et seq.*; Vol. 7, *Moore's Federal Practice*, "For Fraud Upon the Court," p. 60-351, *et seq.*; Vol. 10A, *Federal Practice & Procedure*, Sec. 2737, p. 453, *et seq.*; in which there is reviewed in detail the cases in which Rule 56 of the Federal Rules of Civil Procedure has been utilized, as here, to bring a court's attention by a motion for summary judgment to a critical but ancillary issue.

[28] Pet.App., Appendix C, p. 37a, 40a, n. 4; *see*, Respondent Iowa's Brief in Opposition, p. 13.

FAILURE TO ENTER FINDINGS VIOLATES RULE 52(a)

The Solicitor General supports the Court of Appeals[29] which violated Rule 52(a) when it sustained the district court's refusal to enter findings. There is no authority permitting the Court of Appeals to substitute for findings an alleged "prior scrutiny" of the record allegedly made by the district court and the Court of Appeals of the comprehensive proof in the record.[30] Let it again be stressed that the Court of Appeals, in grave error, was "scrutinizing" the record on the basis of the misconception that the trial on the merits was limited to the lands within the Barrett Survey Line.[31]

PETITIONER TRIBE'S RIGHT TO REGISTRY FUND

As part of the forced fraudulent representation which has so devastated Petitioner Tribe, the Solicitor General supports the Court of Appeals' authorization of the unconscionable seizure of Petitioner Tribe's profits from its farming operations by the Department of Justice to pay for alleged improvements.[32]

Respectfully submitted,

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[29] Opposition, p. 9-10; para. c.

[30] Pet.App., Appendix C, p. 37a, 42a-44a.

[31] For imperative requirement of findings, *see, United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); Vol. 5A, *Moore's Federal Practice*, Rule 52.03[3], "Findings that are induced by an erroneous view of the law are not binding. Nor are findings that combined both fact and law, when there is error as to the law."

[32] Pet., p. 26-28, commentary and citations.